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ABSTRACT

Concerned with protecting the First Amendment rights of high school and college journalists, this focused journal issue analyzes libel law and the question of liability in the student press. Covering such broad topics as ethics, courts, censorship, administration, student government, and libel, the journal articles (1) question journalism as a profession, (2) reexamine court decisions concerning the censorship of school newspaper articles and other school journalism related matters, (3) discuss administrative concerns such as publications policies and the use of censorship issues as a cause for dismissal, (4) relate one school's efforts to change the funding and control of the campus newspaper, (5) report on school libel issues, (6) raise the question of payment in liability cases, and (7) examine the elements of libel. (HOD)

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Student Press Law Center Report,

Vol. VI, No. 3, Fall 1985

Leslie Keros, Editor

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student press law center

report

Fall 1985
Vol. VI, No. 3

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The SPLC Report

SPLC Report, published three times each year by the Student Press Law Center, summarizes current controversies involving student press rights. The *SPLC Report* is researched, written and produced entirely by journalism and law student interns.

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The role of the press

Is Journalism a Profession?

By Deni Elliott

Do you consider doctors and lawyers professionals? What about university professors, research scientists and marriage counselors? Would you call an auto mechanic, plumber or a beautician a professional?

Most people say without hesitation that doctors and lawyers are professionals and, after a moment of thought, include professors, scientists and counselors. There is almost universal agreement that mechanics and other "tradespeople" are not what we mean by professionals.

Yet when you ask people whether journalists are professionals, particularly if you ask reporters or editors, journalism students or journalism educators, you will certainly find a difference of opinion. You are likely to start a debate centering on the issue of whether calling journalists professionals means that they must be licensed and regulated.

I think that journalists are clearly professionals and that their professionalism can be established without it resulting in licensure and regulations. Licensing and external control would, without question, violate the spirit as well as the letter of First Amendment press protections. However, the belief that professionalism is equatable with licensing and external control reflects confusion between what philosophers call necessary and sufficient conditions of a profession and those that are merely accidental.

Accidental v. Necessary and Sufficient Conditions

Accidental conditions are those which may be common to things within a certain category, but which are not essential in including specific examples in that category. For example, dogs are generally creatures that bark. However, we would still say, "That's a dog," when confronted with a creature of the barkless Basenji breed or with a creature that had all of the essential qualities of dogginess but that didn't bark for some unexplained organic or psychological reason.

While a specific example may lack an accidental quality and still be included within a category, all examples must satisfy the necessary and sufficient conditions for being included in that category.

A necessary condition is a condition that a thing could not lack and still be included in the category. For example, consider the category of "mother." No creature could be

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LAW OF THE STUDENT PRESS

The law can affect *you*

It's been eleven years since the last comprehensive look at high school press law was published and six since college press law was examined.

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Professionalism — *continued*

included in the category of mothers without being female. However, other animals may have the necessary condition without being included. One may be a female without being in the category of mothers, but being female is a necessary condition for being a mother.

A sufficient condition is a condition that automatically includes a thing in the category. For example, giving birth to a viable offspring is sufficient condition for calling a creature a mother. However, giving birth is not a necessary condition. One may become a mother through formal or informal adoption.

The necessary and sufficient conditions for including a creature in the category of mothers might be something like "The creature is female and has either given birth or has, through some other means, become primary caregiver to a youngster."

Necessary and Sufficient Conditions of Professions

Returning to the question of whether journalism should be included in the category of professions, it can be shown that licensing and control by a governing board are neither necessary nor sufficient conditions for deciding if some practice belongs in the professional category. These are, at best, accidental hallmarks which are descriptive of some professions.

Licensing and governing board control are not necessary in including something in the category of profession. University professors, scientists, and marriage counselors are considered professionals without these hallmarks.

Now, it may be the case that some organizations that employ professors, scientists and counselors have governing standards to monitor and limit practitioners' actions, but the sort of monitoring done by a university board, for example, is often far less than the control a news organization exerts over a reporter's or editor's life. The result of violating the standards of a specific employer may mean that the practitioner is out of a job in both of these cases.

The point in saying that licensing and governing boards are not necessary conditions for calling a practice a profession is that, like journalists, someone may be a professor, scientist or counselor while not employed at a particular organization with specific guidelines for the practitioner's behavior. There are no rational licensing procedures, no entrance requirements in terms of testing or certification, and no procedures for removing a practitioner's ability to work within the chosen professional role for university professors, scientists, counselors, or for journalists.

Nor are licensing and governing boards a sufficient condition for calling something a profession. Auto mechanics, plumbers, beauticians and other trade groups have a licensing procedure and a governing procedure by which those licenses may be revoked. Yet these people are not professionals.

If licensing and governing boards are neither necessary or sufficient conditions for calling something a profession, it's natural to wonder why they are cited so frequently by those fearing the professionalism of journalism. I think these hallmarks are commonly used as the measuring rule because the professions used in comparison are normally the medical and legal professions.

Doctors and lawyers are clearly professionals in this society. It's natural that one would use the most obvious cases in trying to determine if some other practice belongs in the professional category. The problem is that while the appropriate professions were chosen for comparison, the wrong hallmarks were chosen as the comparative property.

What is it about doctors and lawyers that makes us think about them as professionals? It's certainly not that they're licensed and that those licenses may be revoked. As already discussed, this determination alone would classify doctors and lawyers as no different from many tradespeople.

What primarily makes doctors and lawyers professionals is the function they serve within society. A necessary and sufficient condition for including something in the category of profession is "the occupation plays an important role within the community it serves and practitioners have the power to affect individuals' lives in a lasting and significant way."

The case for these hallmarks being necessary and

continued

sufficient conditions can be better seen by applying the proposed conditions to the job examples listed at the beginning of this column. Like doctors and lawyers, professors, scientists and counselors all play important roles within their communities. They are expected to uphold high standards of practice even if those standards are not described as explicitly as those detailed by the American Medical Association and the American Bar Association.

Professors are expected to hold certain commitments to scholarship, scientists to research and counselors to encouraging psychological health and growth. Representatives of all three professions are expected to set aside their personal interests and concerns to meet the needs of the people they affect whether these people are students, subjects or recipients of research efforts, or clients.

These professionals are powerful in that they can affect individuals' lives in a significant way. Now, it's true that I'll think the effect is significant when my auto mechanic destroys rather than fixes my car, but that event is not likely to have the same impact as a professor whom I trust telling me that I really can't write, a scientist falsifying research records, or a counselor telling me that I shouldn't bother working things out with the bozo I married. Part of the expectation of professionals is that they will be careful of how they exercise their power so as not to cause undue or indiscriminate harm.

Journalism Has the Necessary and Sufficient Conditions of Professionalism

Consider journalism within the proposed necessary and sufficient hallmarks. Journalists play an important function within communities. Whether the community is a school community or the entire nation, journalists are very powerful members of that community.

Members of the community may not uncritically believe everything they're told through the media, but they have to accept some of it as close to accurate. Media provide the only methods that most individuals have for discovering what of interest or importance is happening in their world.

Journalists, then, play an important role in the community, and they are also, indisputably, very powerful individuals. Use of media power can easily result in the complete ruin of an individual's personal or professional life. A minimal expectation for journalists in any community is that they will set aside their own personal prejudices and self-interest to produce information that is as unbiased, balanced and fair as possible.

Journalists clearly are professionals when judged by the same essential criteria that make professors, scientists, counselors, doctors and lawyers professionals. Calling them professionals is simple recognition of the role journalists already play within a community, not a suggestion that their freedom be interfered with through licensing and external control.

One might wonder then what difference it makes to call journalists professionals. There is obviously reason to fear that designation if it would result in licensing and governing boards. But it's fair to question why one should bother putting the label of profession on journalism.

The tendency of some reporters and editors in some news organizations to dispute the power they hold in the community or to say that they are not responsible for the effects of their stories makes it imperative to begin speaking clearly about journalism as the powerful profession it is. In fact, the common argument against the professionalism of journalism may be nothing more than a smokescreen covering up the real fear that if journalists are professionals, they will not be able to avoid the responsibilities associated with their power. ■

Editor's note: Deni Elliott, who has written columns on journalism ethics for the SPLC **Report** *for the past two years, will become Professor Deni Elliott when she joins the journalism faculty of Utah State University in Logan, Utah, this fall. Dr. Elliott's dissertation at Harvard University was on the teaching of journalism ethics.*

Missouri

Hazelwood editors appeal court censorship decision

Three former news editors of the Hazelwood East (Mo.) High School student newspaper are appealing a U.S. District Court decision, repeating their claim that the principal's censorship of school newspaper articles on teenage sex, marriage and runaways violated their First Amendment rights.

The case saw 18 months and three court delays pass before it came to trial in November 1984. The decision favoring the school, which was handed down in May, marks a major setback for Catherine Kuhlmeier, Leslie Smart and Lee Ann Tippett-West, who disagreed with Principal Robert Reynolds' contention that the articles were inappropriate for a school newspaper.

"He [Reynolds] tries to cover up the fact that there are problems in this school," Kuhlmeier said earlier in the case. "He wants to make it look like we live in a heaven around here."

The debate arose in May 1983 when the principal deleted a two-page spread of the *Spectrum* because it contained material that was "personal and highly sensitive." Superintendent Thomas Lawson agreed, saying the articles were "totally unnecessary to be included in the school newspaper."

Reynolds testified that he had "no objection whatsoever" to articles on teenage marriages, runaways, juvenile delinquents or teenage pregnancy. However, he objected to three "personal" accounts of pregnant Hazelwood East students in a *Spectrum* article which described their use or non-use of birth control methods.

Although the three females interviewed gave permission for use of their comments and were not named in the story, Reynolds maintained that readers would still be able to identify them. He also claimed the material was "too sensitive" for the "immature audience of readers" at Hazelwood East.

Kuhlmeier said she was aware of eight to 10 pregnant students at the school when the articles were written. Because the subjects were not named, Kuhlmeier said she believed nothing was wrong with publishing the story.

The principal censored another story which investigated the impact of divorce on children, stating the reporter failed to contact the parents to explain or rebut the quoted statements of their children. Reynolds said the reporters thereby violated the "rules of fairness" in journalism which justified his deletion of the article. As before, the students' names were not mentioned in the article.

In both instances, Reynolds noted the reporters' failure to request the subjects' parental consent prior to writing the articles.

A central factor in the case was the question of *Spectrum's* status as either a public forum for student expression or merely an "instructionally-related activity." In reaching a decision, the judge said the paper was essentially a "project" of students in the Journalism II course: a textbook was used to teach journalistic concepts, and grades and credit were awarded upon course completion. Because the school's publications policy requires

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prior review, the court considered the principal and adviser to have "final authority" over content of the paper. The judge therefore described *Spectrum* as a "laboratory exercise" which did not qualify as a public forum.

The court held that censorship of non-libelous, non-obscene material in a "classroom exercise" such as *Spectrum* is justifiable — provided the principal show a "substantial and reasonable basis" for his actions.

"Where the particular program or activity is an integral part of the school's educational function, something less than substantial disruption of the educational process may justify prior restraint on students' speech and press activities," the court held.

Crediting Reynolds' opinion that articles discussing topics such as teenage pregnancy were "not appropriate" for *Spectrum* readers, "given their age and maturity," the court ruled that the principal demonstrated a sufficient basis for censorship — one which did not constitute an abridgement of students' First Amendment rights.

Although the three editors have graduated since their suit was filed, they appear determined to continue the lawsuit. Kuhlmeier, Smart, and Tippett-West are taking the case to the U.S. Court of Appeals for the Eighth Circuit and have asked the Student Press Law Center to file an *amicus curiae* (friend of the court) brief on their behalf.

SPLC executive director Mark Goodman said he believes a central flaw in the court decision is the ruling that *Spectrum* does not qualify as a public forum for free expression by students.

Goodman agreed that the paper was written and designed "in large part" by journalism students, but said *Spectrum's* presence was felt "far outside of the Journalism II classroom."

Factors which distinguished the paper from a "laboratory exercise" include the depth of its content, its distribution, and the extent to which the adviser actually influenced choice of material printed, according to Goodman. He noted that the paper published editorials and news articles of interest to the students, that its circulation exceeded 4,500 during the school year and that it was distributed for 25 cents to the student body and to the public, and that no evidence indicates that the adviser chose which stories were to be published.

Goodman pointed out that the grades of students enrolled in the Journalism II course were unaffected by whether their articles appeared in the paper. Further, he said, students not enrolled in the course could submit articles for publication.

"*Spectrum* clearly had some function beyond that of the Journalism II curriculum," Goodman said. "It was not merely a course exercise which remained in the files of the journalism department. It was, in fact, a forum."

Goodman also questioned the court's decision regarding the principal's basis for censorship. In prohibiting the articles from publication, the principal did not expressly deem them obscene, libelous or as causing substantial disruption of school activities. Courts have ruled that only these standards justify prior restraint when a student publication is shown to be a forum, Goodman said.

The constitutionality of Hazelwood East's publications policy appears to be a third bone of contention. Goodman stated that while the policy permits prior restraint, it does not offer specific criteria as to what material may be censored. It fails to include guidelines by which administrators can reasonably predict that certain material will cause substantial disruption, and does not provide for an expeditious procedure of review and appeal, Goodman argued. Moreover, he said, the policy does not define the terms "obscenity," "disruption," "distribution" and "defamatory."

Leslie Edwards, attorney for the *Spectrum* editors, is preparing documents for appeal. A court date has not yet been set. ■

Maine

History teacher fights 'intolerance'

In a decision that could have implications for student publications, the Maine Supreme Court ruled in July that threats of disruption from people outside a school can justify restrictions on expression in a school symposium.

Threats of bombing and sabotage aimed toward school administrators occurred when Dale McCormick, president of the Maine Lesbian/Gay Political Alliance, was asked to speak at Madison (Me.) High School in January during "Tolerance Day," a symposium featuring representatives from groups against whom intolerance was thought to be practiced.

The symposium, which was subsequently cancelled to preserve the "safety, order and security" of the school, also invited representatives from groups such as the elderly, blacks, veterans, Indians, Vietnamese, ex-convicts, child-abuse victims and Jews to speak before the high school assembly. Students were to attend an opening talk discussing "general elements of intolerance," and then had the option of attending seminars conducted by the representatives.

The program, scheduled for Jan. 25, was created and proposed by David Solmitz, a history teacher for 16 years at Madison. The idea was fostered by students' desires to "lessen prejudice" against these groups, particularly against homosexuals, Solmitz said. He took the proposal to a faculty meeting, and there won the teachers' approval of the program.

On Jan. 15, despite the program's support from both students and faculty, Principal Tony Krapf advised Solmitz to exclude the homosexual representation, saying it would not be "appropriate" for a high school assembly.

The superintendent affirmed Krapf's suggestion, saying that homosexual representation would be viewed adversely by the community and could injure the school's public image.

School administrators were not alone in their criticism. Less than one week before the symposium, board of education members received numerous calls from local organizations and parents critical of homosexual representation in the program. Some callers threatened to picket and bomb the school on Tolerance Day.

After a closed meeting Jan. 21, the board voted unanimously to cancel Tolerance Day out of concern that the students' safety might be endangered by adults objecting to the inclusion of homosexual representation in the program.

Just after the cancellation, 169 students and 23 faculty members presented petitions supporting the symposium. Solmitz and McCormick subsequently filed a motion for a temporary restraining order, asking the superior court to allow Tolerance Day to proceed as scheduled.

But on Jan. 24, one day before the symposium was to be conducted, the superior court upheld the board's cancellation.

Five days later, Solmitz and McCormick filed suit against the Madison School Administrative District, claiming that the board's cancellation violated their rights to freedom of speech and that it discriminated against the homosexual community.

The court concluded that the cancellation did not violate Solmitz's and McCormick's freedom of speech rights, because the board was within its legal authority to bow to threats "from those who wanted to keep students at Madison High from gaining a greater perspective on different life styles in the world."

In considering the case, the court

continued

sound that the Tolerance Day program would have been held had threats not been advanced against school administrators.

Solmitz and McCormick appealed the decision to the Maine Supreme Court and, because of the implications the case had for student expression in Maine schools, asked the Student Press Law Center to join in an *amicus curiae* (friend of the court) brief in their support.

In its brief, the SPLC argued that the school qualified as a public forum, citing similar programs held at the school which featured outside speakers from "different" backgrounds. The board's cancellation of Tolerance Day constituted a violation of First Amendment rights, the SPLC contended, because school officials failed to show that the symposium itself would materially and substantially disrupt school activities.

"The *amicus* sees this case as part of a continuing effort by public school boards and public school administrators across the nation to impose a pall of orthodoxy upon the thinking of America's secondary students," the brief read.

"In that the First Amendment precludes interference with the open discussion of unpopular ideas, and because the school is an institution uniquely qualified for the dissemination of those ideas," the brief stated, "such attempts must be opposed wherever they occur."

But the supreme court upheld the lower court's decision, stating that the school board ultimately had the power to oversee the school's curriculum, according to Jed Davis, attorney for Solmitz and McCormick.

The "most serious implication" of this decision, Davis said, is that the courts have "given in to threats of disruption" from outside parties. He added that Solmitz and McCormick may appeal the decision to the U.S. Supreme Court. ■

Editors appeal decision

Calif. court permits prior restraint

Editors of *La Voz Del Vaquero* and the American Civil Liberties Union are appealing a California Superior Court decision in their fight against prior restraint at Rancho Alamitos High School.

After a March hearing on a motion for summary judgment — the granting of a verdict in a case before it goes to trial — the judge dismissed the suit, rejecting the ACLU's arguments that a California statute and a school district regulation which permit prior restraint are unconstitutional.

The case began last spring, when Principal James Delong prohibited distribution of an April Fools edition of the paper, fearing the photograph and accompanying caption of an article, "Nude Photos: Girls of Rancho," might be libelous.

At first, Delong merely objected to the use of the word "nude" in the headline. But after consulting with the school district's attorney, Delong cited as grounds for censorship the paper's announcement that *Playboy* magazine was accepting applications for a photo spread to be titled, "Girls of Rancho," and an accompanying photograph of five female students captioned, "Prospective playmates ..." The girls reportedly were unaware that the photograph would be used in that manner in the humor edition.

Newspaper adviser Edward Surek had approved the April Fools edition of the paper prior to its submission.

ACLU attorney Gary Williams said he will focus the appeal on what he considers violations of student press freedoms inherent in the California Education Code.

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Rancho Alamitos — *continued*

Williams wants the court to consider as persuasive precedent the ruling in *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972), which held that any system of prior restraint in a secondary school setting is unconstitutional. The *Fujishima* decision binds schools in Illinois, Indiana and Wisconsin.

However, Williams said even if the court allows prior restraint, as many courts have done, the "broad language" of the statute cannot withstand constitutional scrutiny.

The federal courts have determined that systems of prior restraint "must have clear and precise standards defining prohibited material, a specific set of procedural safeguards, specific short time frames for the rendition of administrative decisions, and provide for expeditious judicial review," he wrote in a court brief.

The California Education Code permits school officials to exercise prior restraint of "obscene, libelous and slanderous" material so long as the school officials justify such censorship "without undue delay."

Williams said in his complaint that the statute's constitutional flaws are "readily apparent." First, the phrase, "without undue delay" fails to specify deadlines within which school officials can justify censorship of student articles, he said. Also, the provisions do not outline an appeals procedure for review of a principal's decision and do not provide for judicial review of an adverse decision. Finally, the code does not define the terms, "libelous," "obscene" or "slanderous" in order to guide school administrators and students, Williams stated.

In effect, he said, the education code teaches the students of the district that the "principles of freedom of speech and freedom of the press are mere platitudes which can be abrogated at any time in the discretion of a school principal." ■

California

Opinion editor fights dismissal

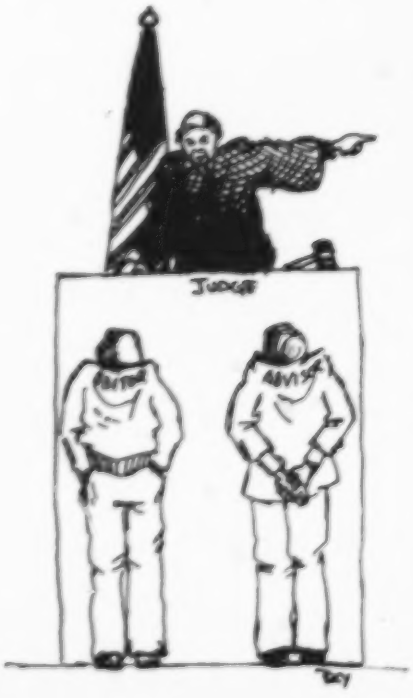
The opinion editor of the Los Angeles Harbor College newspaper, fired from his position for distributing anti-Semitic pamphlets during the school's Holocaust commemoration, has been temporarily reinstated by a federal district court judge.

Joseph Fields, *Harbor Hawk* staff writer, asked the court for a preliminary injunction returning him to his position as opinion editor of the newspaper. His suit claimed that student editor-in-chief Joseph Granberg had violated Fields' rights of free association and free speech in removing him from his position.

In temporarily reinstating Fields, the judge commented that Granberg's actions may have violated the opinion editor's First Amendment rights, but ruled that the question will not arise until Fields completes an internal grievance procedure at Harbor determining if he will be permanently reinstated.

Fields was dismissed by Granberg in February after assisting Tom Metzger, former grand dragon of the Ku Klux Klan, in denouncing the Holocaust as a "myth" during the college's third annual Holocaust commemoration. Granberg said he had warned Fields at length that he would be dismissed if he presented his views at the ceremony.

The board of trustees voted last December to censure the *Hawk* after Fields' columns had "outraged" the Jewish community, according to local newspaper reports.



The trustees also considered imposing a policy banning articles that "denigrate" people on the basis of race, ethnicity or sexual orientation, a local newspaper stated. But professors and local journalists objected, claiming it imposed an unconstitutional prior restraint on student publications, the paper reported.

The opinion editor's anti-Semitic commentaries have been a "point of controversy" for more than a year, according to David Wolf, dean of academic affairs. He emphasized that school administrators and the Harbor College journalism department have attempted to remain neutral in the dispute.

"The school repeatedly made it clear that it was not our role" to decide whether Fields should be removed, Wolf said. "The editor's decision, whether we agree with it our not, is final."

Gary Williams, an American Civil Liberties Union attorney representing Fields, said he is negotiating with the school's attorney to persuade the Los Angeles Community College District Board of Trustees to hear Fields' case. He said Fields may decide to settle the case out-of-court if the *Hawk* agrees his termination was "improper." ■

Tax exemption draws debate

Florida paper wins court battle against state Dept. of Revenue

Editors at *The Independent Florida Alligator* have won a three-year court battle against the state Department of Revenue (DOR) over the right to be exempt from state sales tax.

In a unanimous decision, the Florida Supreme Court ruled in July that the DOR was incorrect in asserting that the *Alligator*, an independent student publication at the University of Florida, could not be considered a sales tax-exempt "newspaper" because of its free distribution.

The question arose in July 1980 when the DOR contacted the *Alligator* and said the publication owed the state $23,000 in back taxes which were unpaid between 1977 and 1980.

Under a 1979 statute, "newspapers" are exempt from sales tax because such a tax was interpreted as a restriction on free speech. In an attempt to distinguish newspapers from "shoppers," which are distributed mainly for advertising purposes, the DOR added a stipulation to the state administrative code stating that all free-distribution publications would not be considered "newspapers" and must pay sales tax.

The *Alligator* had never paid sales tax until the DOR contacted the publication, according to Edward Barber, the paper's business manager. Campus Communications, the paper's publisher, considered the *Alligator* a newspaper which would therefore be tax-exempt, Barber said.

Upon notification from the DOR, the paper began paying sales taxes in 1980 "under protest," according to Lee Johnson, attorney for the *Alligator*.

But Johnson called the DOR's assessment of the *Alligator's* status "erroneous," contending that the First Amendment protected the paper from paying taxes.

"Its primary purpose is the dissemination of news," he said in his arguments before the supreme court. "The price a reader pays has nothing to do with the character of a publication.

"The *Alligator* presents an easy case: It's undeniably a newspaper and entitled to the same treatment as a paid-circulation paper," Johnson said.

Staffed exclusively by University of Florida students, the *Alligator* has operated independently of the school since 1973. The paper maintains a circulation of 30,000 and supports itself entirely through advertising revenue.

Editor Frank LoMonte said he finds the situation "ridiculous."

"The *Alligator* prints more news than many big city papers," he said, adding that the DOR's restrictions have raised questions from other independent, free-distribution college publications such as *The Flambeau* at Florida State University in Tallahassee.

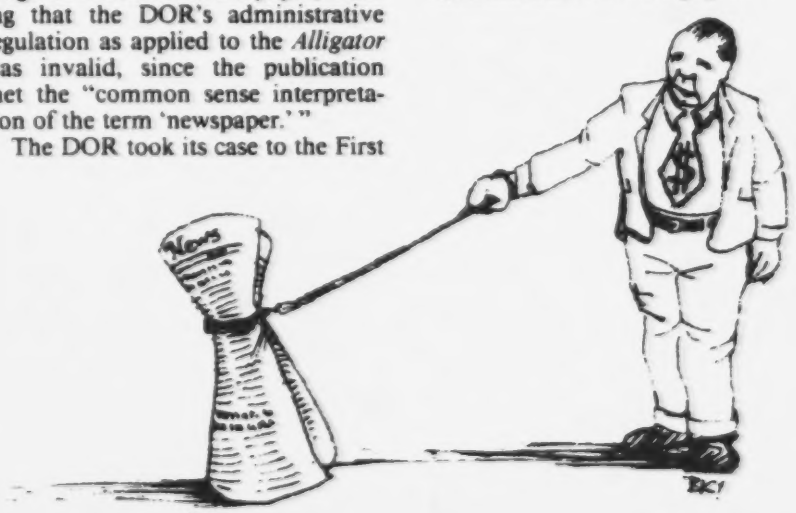
In November 1982, Campus Communications filed suit in district court on behalf of the *Alligator* against the DOR, claiming that it qualified as a newspaper and should not be required to pay sales tax although it was distributed free.

The court granted summary judgment in favor of the paper, holding that the DOR's administrative regulation as applied to the *Alligator* was invalid, since the publication met the "common sense interpretation of the term 'newspaper.'"

The DOR took its case to the First District Court of Appeals, which overturned the lower court's decision but admitted that there was a question as to whether the *Alligator* should qualify as a newspaper despite its free distribution. The paper appealed the decision to the state supreme court.

In reaching a decision, the supreme court listed several factors which distinguished the *Alligator* from a shopper. These include the non-profit status of its publisher, Campus Communications, Inc.; the "tradition of training student journalists" through practical newspaper experience; the inclusion of a broad range of news stories including staff-written and wire service material; and the relatively low percentage of space devoted to advertising as compared to that of shoppers. Under these circumstances, the court concluded that the *Alligator* qualified as a newspaper and was tax-exempt.

The court considered the DOR's rule "inadequate" because it prohibited bona fide newspapers like the *Alligator* from being sales tax-exempt because they are distributed free. The court ruled that the DOR must include a provision in the state administrative code which would accommodate all newspapers. ■



Iowa

'Rape' story gains legal acceptance

Editors at the *Iowa State Daily* have emerged victorious in fighting a $9,000 libel suit formerly won against the paper for an article reporting a "rape."

The decision, handed down from the state supreme court July 31, overturned a lower court's ruling that the *Daily's* article had libelously reported a sexual assault as a rape.

The libel suit arose in January 1982, after the Iowa State University newspaper published an article reporting that a female bartender at the local American Legion Hall had been raped.

Laurie Hovey sued the *Daily*, claiming that she was sexually assaulted, not raped. She asserted that although she was not named in the article, people could identify her as the victim because she was the only female bartender who worked at the hall when the incident was reported to have occurred.

The suit charged the paper with "reckless disregard" because, according to a court clerk's testimony, the clerk repeatedly informed a *Daily* reporter that Hovey's attacker had been charged with second-degree sexual abuse, not rape.

The appeal centered on the trial court's decision to hold the *Daily* accountable for the legal definition of "rape": "forcible, nonconsensual sexual intercourse" — not to be equated with "sexual abuse."

The definition of "rape" under Iowa law has become elusive since the 1977 passage of a statute which does not contain the word. The statute defines "sexual abuse" as any sex act between persons done by force or against the will of one of the parties, or any sex act in which one of the parties is a child or a mentally handicapped person. The term "rape" is not explicitly defined in the statute, although the editor of the state code inserted the term parenthetically under the "Sexual Abuse" chapter heading.

Daily attorney James Brewer noted that the paper had complied with Hovey's request to print a retraction clarifying the charge against her attacker as second-degree sexual abuse, not rape.

Brewer, however, argued that since rape is no longer defined separately from sexual abuse under Iowa law but is inserted parenthetically in the state code, a lay person has the right to make the assumption that rape and sexual abuse "mean the same thing."

"The press has the right to the broader definition," he said. Brewer added that since such definitions vary from state to state, many publications may find it difficult to write in language that follows the legal definition of rape.

To date, at least 20 states have eliminated the term "rape" in order to redefine sexual assaults in gender-neutral terms, according to an article in the *National Law Journal*.

Patrick W. Brooks, attorney for Hovey, contends that the definition of "rape" that District Court Judge Carl Baker instructed the jury to consider was proper. He claims that although the 1977 Iowa statute does not distinguish rape from sexual abuse, case law remains which defines the elements of rape.

But the state supreme court held that in reports of matters involving violation of the law, technical errors "are of no legal consequence" if the report is substantially true.

In considering the case, the court acknowledged that the terms "rape" and "sexual abuse" have been regarded interchangeably since passage of the 1977 statute. Holding that the *Daily* had established its article as substantially true and hence not actionable, the supreme court overturned the trial court's decision. ■

Texas

Artist banned from graduation for offensive cartoon files suit

An award-winning student cartoonist for the Stephen F. Austin High School newspaper is suing the Austin Independent School District after it suspended him and banned him from graduation for submitting a drawing showing two students apparently masturbating.

The case arose in May after the cartoon was published in *The Maroon's* final edition of the school year. Senior Whitney Ayres, who submitted the so-called "obscene" cartoon nine days after his usual deadline, was suspended for three days and banned from participating in graduation ceremonies by Principal Jacquelyn McGee after a hearing held by the Campus Review Board.

Former *Maroon* adviser Tom Prentice said the cartoon was not subjected to "editorial scrutiny" due to its late submission. However, Prentice said, he requested disciplinary action against Ayres after several students brought the cartoon to his attention minutes after it was published.

Prentice, current director of services at the Texas Daily Newspaper Association, said in a May 22 *Austin-American Statesman* article that the apparently obscene material was "surreptitiously and subliminally inserted into the comic strip."

"It had to be pointed out to me," Prentice explained. "That makes it a more heinous offense because he [Ayres] clearly calculated that we would follow the obvious story line of the comic strip and the business of the artwork would divert our attention away from the lewdness."

Editor Trey Hailey said he reviewed the cartoon before publication but did not notice the masturbating characters, according to the *Statesman* article.

After he was informed of the drawing, Hailey said, he examined the comic strip with a magnifying glass. "It was not obvious," he remarked.

Ayres, who had contributed his comic strip, "Lucky," to *The Maroon* for three years, achieved first place in a contest sponsored by the American Publishers Association and Quill and Scroll, an international honor society for high school journalists. He received the award prior to submission of the cartoon which led to his suspension.

Ayres appealed the principal's decision to Associate Superintendent Gonzolo Garza and to Superintendent John Ellis, but both officials affirmed McGee's decision. Due to time constraints, Ayres stated, he was unable to appeal to the board of trustees.

On May 28 — the day of graduation — Ayres filed a motion in Texas district court for a temporary restraining order asking the court to enjoin officials from banning his participation in commencement exercises, claiming his punishment abridged his free speech and free press rights. The court denied his request two hours before the ceremonies were to begin.

continued on p.14

Cartoonist — *continued*

The motion alleged that school officials acted "wilfully out of malice, deliberate indifference, and gross negligence with respect to Whitney Ayers' rights" in suspending him and banning him from participation in commencement exercises, and that the punishment caused him "substantial humiliation [and] embarrassment."

Ayres also claimed that his punishment lacked merit because he was not charged with a punishable offense under school district regulations.

But in their reply brief, school officials charged that by "waiting past the deadline" to submit his cartoon for editorial review, Ayres "intentionally" set out to violate the editorial policy of the newspaper. His actions, they argued, constituted a violation of class procedure and were therefore punishable under the school district's disciplinary policy.

Owen Kinney, attorney for Ayres, noted that school officials provided no grounds in their brief for alleging that Ayres "waited past" his deadline. Also, the editorial policy of *The Maroon* does not stipulate a deadline by which articles and artwork must be submitted.

The school district also alleged that Ayres' cartoon was obscene and therefore not protected by the First Amendment. The brief did not specify what legal standards the officials used to define the cartoon as "obscene," although Prentice later claimed the obscenity standards used accorded with those of the U.S. Supreme Court.

The Supreme Court defined the latest standards for obscenity in the landmark case *Miller v. California*, 413 U.S. 15 (1973). To qualify as legally obscene, the Court ruled that material must meet all of the following criteria:

— Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest;

— Whether the work depicts or describes, in a patently offensive manner, sexual conduct as defined by state law;

— Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Obscenity is legally defined in Texas largely according to the *Miller* test (*see West v. State*, S.W. 2d 433 (Tex. 1974)).

The officials also alleged that publication of Ayres' comic strip caused a substantial disruption of school activities, but Kinney contends that no evidence to support this was given by the Campus Review Board during Ayres' hearing.

Kinney voiced concern about the possible effects of the censorship on future *Maroon* staffers. He predicts that new editors will be "intimidated by Ayres' punishment."

A hearing in district court has not been scheduled. Kinney said he is now preparing documents for trial. ■

Nevada

Planned Parenthood challenges ad refusal

Planned Parenthood of Southern Nevada, Inc. (PPSN) is gathering its legal artillery in the mounting controversy over regulation of paid advertisements in student publications within the Clark County School District (CCSD).

In August, PPSN will file a motion for summary judgment in federal district court before its suit against CCSD goes to trial.

The nonprofit organization filed a lawsuit in December against CCSD in the U.S. District Court for Nevada, asking the court to declare that the school district violated PPSN's free speech rights by rejecting Planned Parenthood advertising while accepting advertising from other sources.

The suit also asks the court to enjoin school district officials from rejecting PPSN advertising in high school publications which otherwise accept advertising.

In the amended complaint, PPSN claims the district's policy violates the First and Fourteenth Amendments because it allows high school principals to censor advertising "without establishing narrow, objective and definite standards to guide their conduct."

The complaint contends that high school students and other third parties who may seek access to Planned Parenthood's services have been harmed by the district's refusal to print PPSN advertising.

"Such harm is irreparable and continuing and is a restraint on the students' and other third parties' rights to receive information," the brief stated.

This court case may be the first to test the free speech rights of family planning providers to advertise their services in high school publications, according to Planned Parenthood executive director Kim Hansen.

The suit names as defendants CCSD, the board of trustees, Superintendent Robert Wentz and 10 secondary school principals. CCSD comprises 12 high schools, 11 of which publish student newspapers. Clark County includes the city of Las Vegas and is populated by more than half of Nevada's residents.

The question originally arose in 1979 when Terry Manion, CCSD director of senior high schools, ordered that no PPSN advertisements be printed in any Clark County school publications. Previously, Planned Parenthood had placed ads in CCSD high school papers soliciting its advertisements.

PPSN protested Manion's decision, and after negotiations with district officials, each school was

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granted the authority to regulate its advertising policy. Several high schools continued to print Planned Parenthood ads but others rejected the advertising.

In April 1984, CCSD distributed a memorandum to its high school principals to provide guidance "as to what power over advertising in CCSD publications they possess." The school district's memo did not specifically instruct principals on how to treat advertising of birth control products or related information, but did suggest that ads "having explicit sexual content or overtones" could be excluded.

During the spring and fall of that year, PPSN submitted advertisements to each high school newspaper in the district, according to PPSN community affairs coordinator Dan Holt. The ads stated the availability of certain medical services, counseling and other informational services relating to reproductive health. Several advertisements included the availability of birth control products and related information.

Five schools immediately rejected the ads, Holt stated. Six other schools published two advertisements during the school year, but after receiving complaints from parents, two of these schools also rejected Planned Parenthood advertising, according to Holt.

PPSN then consulted Roger Evans, director of litigation for Planned Parenthood Federation of America, who concluded that CCSD lacked sufficient grounds to constitutionally prohibit PPSN advertising in Clark County high schools. Planned Parenthood presented Evans' legal opinion to CCSD and requested publication of its advertisements in the school newspapers which accept advertising.

On October 11, 1984, CCSD proposed a formal advertising policy for school publications to the Board of Trustees Policy Committee, but the committee declined action on the policy pending "further study" by school attorneys.

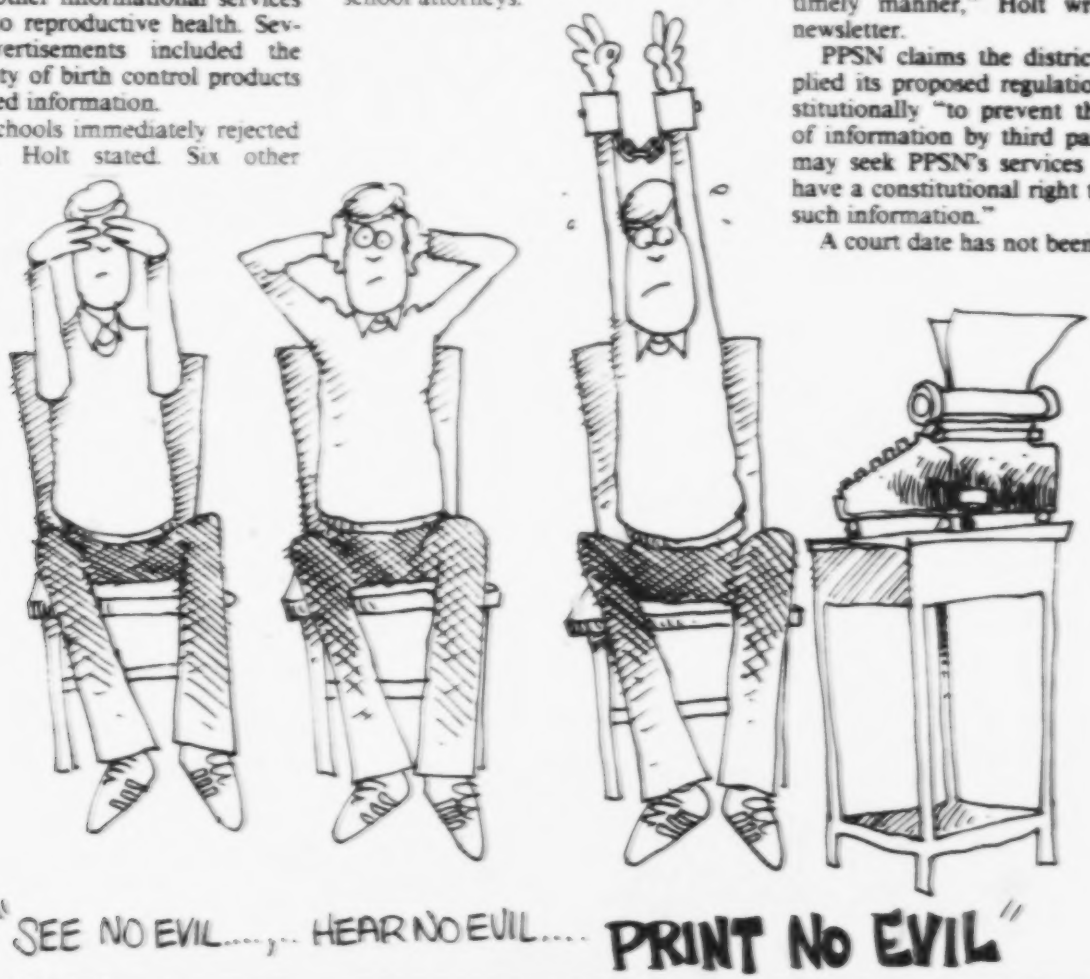
CCSD's proposed regulation prohibits student publications from publishing advertisements of birth control products and information. Other categories of advertising prohibited include "gambling aids," "tobacco products," "drug 'look-a-likes,'" "liquor products," and "items which may not be legally possessed by students less than 18 years of age."

Although it was not formally approved by the policy committee, the proposed regulation was sent to all CCSD secondary school principals. Every school except Clark High School has subsequently rejected PPSN advertising "until the situation is resolved."

Three weeks after the unofficial policy was distributed, Planned Parenthood filed its lawsuit against the district. "It became apparent, ... that the CCSD was not going to act in a timely manner," Holt wrote in a newsletter.

PPSN claims the district has applied its proposed regulation unconstitutionally "to prevent the receipt of information by third parties who may seek PPSN's services and who have a constitutional right to receive such information."

A court date has not been set. ■



Ousted editor continues suit

CSU endorsement ban fuels debate

A former newspaper editor at Humboldt State University (Cal.) is suing the board of trustees and Gov. George Deukmejian over the right to publish unsigned editorials endorsing political candidates in the student newspaper.

Adam Truitt, former editor of the *Lumberjack*, has enmeshed himself in a heated debate over the constitutionality of a 20-year ban enforced by the California State University system prohibiting unsigned political endorsements in student publications.

Truitt filed the suit in state court after he was suspended indefinitely from his post for endorsing presidential candidate Walter Mondale on behalf of the student newspaper last October.

In his suit, which names 46 defendants, Truitt charged that the ban is a violation of students' free speech and free press rights and has asked the court to declare the ban unconstitutional.

CSU administrators maintain that the ban complies with title 5 of the California Administrative Code, which prohibits public university funds from being used to support or oppose candidates for public office.

Because the *Lumberjack* receives five percent of its funds from the student government, school officials said it would be a misuse of tax dollars for the paper as an entity to endorse ballot proposals or political candidates.

Further, they argued, political editorials in student publications must be signed to insure that readers do not presume the opinion of the paper to be that of the school.

The ban is enforced throughout the CSU system and has been followed by most CSU newspapers. One exception is the San Diego State *Daily Aztec*, which also endorsed Mondale and addressed state and local political issues but did not receive adverse administrative reaction, according to a survey conducted by the *San Francisco Sunday Examiner*.

Support or opposition of a political candidate or issue by student newspapers is not banned by the companion University of California system.

Arnie Braafladt, attorney for Truitt, said that CSU administrators have misinterpreted title 5 in applying it to the *Lumberjack*. Braafladt argued that because student newspapers are not state agencies, they are not bound by the code.

"We do not believe that anyone reading a student newspaper would reasonably conclude that the editorial opinions expressed are the views of the State of California," Braafladt said.

"Moreover," he added, "infrequent endorsements by student newspapers do not constitute the government 'taking sides' or amount to forbidden political campaigning by the government."

In the complaint, Braafladt noted that Humboldt State administrators have not shown the endorsements to be substantially disruptive of school activities. Therefore, he argued, the restrictions imposed by the ban constitute an "impermissible" prior re-

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"If you don't like it, resign!"

Sean Parks

straint on student expression.

Truitt's editorial has also spurred debate among student government officers regarding future funding of the *Lumberjack*.

During a November 12, 1984, meeting, Associated Students voted to place the *Lumberjack* on budgetary probation, noting that Truitt's editorial violated the student government's budget language which requires the paper to obey the CSU ban on unsigned political endorsements.

The student government warned Truitt that "any future violations of AS budget language may jeopardize future funding following due process."

But Truitt claimed in his complaint that the student government's enforcement of the ban is an "unreasonable and unconstitutional interference" with his exercise of First and Fourteenth Amendment freedoms.

He said the ban unconstitutionally restricts receipt of student government funding by requiring the paper to agree not to make political endorsements.

Since filing the suit, Truitt has sought passage of a bill in the California legislature clarifying the question of unsigned political endorsements. Assembly Member Dan Hauser introduced the bill to the legislature in March.

If approved by Gov. Deukmejian, Assembly Bill 1720 would bar CSU officials from prohibiting political endorsements, so long as the publication prints a disclaimer stating that the opinions expressed are those of the editorial staff and do not necessarily represent those of the state, university, campus, Associated Students, or any other entity providing financial support of the publication.

AB 1720 has been passed by the assembly and several senate committees, according to Paul Knepprath, legislative director of the California State Student Association (CSSA). He expects the bill to be "on the governor's desk" for consideration by the end of August.

Knepprath said the Humboldt State board of trustees opposed Hauser's bill at a July 10 meeting. Gov. Deukmejian was present at the board meeting but did not offer any comments during the board's discussion, Knepprath said.

To date, 15 CSU campus newspapers have hailed Truitt's efforts and support AB 1720, according to the California Polytechnic State University *Mustang Daily*.

However, the HSU College Republicans have not shared this optimism. In June, the club was granted its motion to intervene in Truitt's suit, claiming that all sides were not being "properly represented" in the case.

In their complaint, the College Republicans argued that unsigned political endorsements abridged the student body's First and Fourteenth Amendment rights by "compelling students to support candidates, parties, ideologies or causes which they may be against."

The College Republicans asked the state court to declare constitutional the university's ban on unsigned political endorsements by the *Lumberjack*. The club also requested the court to permanently enjoin the paper from failing to "properly disclaim" such endorsements so as to inform readers that the opinions expressed are "personal" to the majority of the *Lumberjack* editorial staff.

Truitt's attorney opposed the club's intervention, arguing that it raised extraneous issues and would block an expeditious trial.

Braafladt said he may file a motion for summary judgment to dismiss the case before it goes to trial. ■

Wyoming

Adviser seeks 'constitutional' policy

A newspaper adviser fired from Gillette (Wyo.) High School has refused to drop her suit against the Campbell County School District until the district adopts a publications policy which "meets constitutional standards."

Despite a $51,000 preliminary settlement, former adviser Judy Worth and the Wyoming Education Association (WEA) will continue to fight enforcement of a "censorship policy" in the school district.

"The intent and effect of the policy is to have a chilling effect on the free expression of ideas . . . and to limit student journalism to discussion of that which is innocuous and insignificant," the complaint read.

The suit, filed last August in federal district court, grew from a censorship incident at Gillette which had led to Worth's dismissal as adviser.

The controversy dates to December 1983 when staff members of the school newspaper, *Camel Tracks*, planned to print a nationally syndicated cartoon satirizing the Moral Majority. The decision to print the cartoon was in protest to citizen efforts to remove Steven King's *The Shining* from the school library.

Former Gillette Principal Jay Cason banned the cartoon, claiming that it "ridicule[d] the conservative viewpoint." He said the cartoon violated the school policy which prohibited distribution of material that "subjects any person to hatred, ridicule, contempt, or injury of reputation."

Worth, who also teaches English at the school, and her students complied with Cason's request, but contacted the Student Press Law Center and the American Civil Liberties Union in an effort to change the existing policy. She later presented a revised policy, based on SPLC guidelines, to the board of trustees.

But by May 1984, a new publications policy had still not surfaced. Instead, Worth was removed from her eight-year post as adviser to *Camel Tracks* and the yearbook.

School officials admitted that Worth's outspoken protests against censorship played a role in their decision to dismiss her, according to newspaper reports. The officials contend that the student newspaper and yearbook had declined in her tenure, but Patrick Hacker, attorney for Worth, countered that *Camel Tracks* won several awards under Worth and that the teacher had consistently received "outstanding evaluations" throughout her employment.

On August 28, 1984, board members adopted a revised policy, saying they hoped it would clear them of any legal battles. But three days later the WEA filed suit on Worth's behalf.

"We feel compelled to file this action to protect the First Amendment rights of students and teachers," WEA President Linda Stowers said in a press release. "It is our opinion that the previous policy on student publications and the one approved on August 28 violates freedom of the press."

As in many disputes over advisers' rights, this case may hinge on whether Worth has standing to defend the First Amendment rights of her students in challenging the existing policy. Hacker said he will cite as persuasive precedent the Colorado Supreme Court's decision in *Olson v. State Board of Community Colleges and Occupational Education*, 687 P.2d 429 (Colo. 1984), which granted newspaper advisers the power to defend the First Amendment rights of their students (*see story this issue*).

Regarding the policy itself, Worth attacked it in her complaint as being unconstitutionally vague, overinclusive, underinclusive, lacking due process and as "not being justified by any legitimate governmental purpose."

Hacker said the policy failed to provide legal definitions of "obscene" and "libelous" material. The policy did not define its provision prohibiting "statements or innuendos that would subject any person to hatred, ridicule, contempt

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Courtesy of Don Wright, *Miami News*

or injury of reputation," nor did it specify material that would "endanger or be detrimental to the health, welfare, safety or morals of students," Hacker noted. It failed to provide guidelines by which administrators could predict disruption, and prohibited publication of anonymous material. Further, he said, the policy neglected to meet the requisites of due process, such as the students' right to personally appeal an official's decision or advocate distribution of material.

"I'm talking to the stone age," Hacker chuckled.

There are indications that the board is relenting to Worth's demands for a revised policy. Hacker said a new policy is being negotiated that would remove "many vague, generic terms" from the existing policy. Revisions proposed by the board include eliminating automatic prior review, defining "obscene" and "libelous" material according to the latest U.S. Supreme Court standards, and setting "reasonable" timelines for due process.

"It's a far more liberal policy" than the existing one, Hacker observed. He emphasized, however, that Worth will not drop her suit against the school district until it adopts a "constitutionally acceptable" policy.

Worth has asked the court to enjoin the school district from carrying out the existing policy until it develops one that meets legal standards. Since the filing of Worth's suit, the board of education has agreed to revise its publications policy. The proposed revisions were scheduled for public hearings in late July.

Worth's complaint also charged that the district "wilfully retaliated" against her for protesting censorship of the school newspaper.

It claimed Worth was "specifically chastised for 'not going through the chain of command' in contacting the ACLU and the SPLC in support of student free press rights."

The school district denied that it took "great exception" to Worth's consultations with the ACLU and SPLC, but admitted that it queried students on their methods of contacting the organizations.

In her complaint, Worth had asked the court to reinstate her as adviser to *Camel Tracks*, and to award her an unspecified amount of back pay and compensation for emotional suffering, damages to career and reputation injury.

"What has happened to Judy represents one of the most serious threats to an uncensored student press and the education of students," WEA President Stowers said.

"Freedom of the press is the cornerstone of our democracy, and public education is the key to teaching young people to understand and maintain that freedom." ■

New York

Former adviser files lawsuit to regain 20-year position

A former newspaper adviser at Carle Place (N.Y.) High School is suing the board of education to regain her 20-year position, claiming she was dismissed by the principal for refusing to censor and delete articles in the student newspaper.

Joan Lyons Sulsky, former adviser to *The Crossroads* and tenured English teacher at Carle Place, is asking a federal district court to reinstate her position as adviser and to enjoin school officials from "interfering with her First Amendment free speech rights."

Sulsky, who was removed as adviser to the student newspaper in 1981, is asking the court to award her $50,000 in damages, as well as compensation and back pay. The suit, filed in April 1982, names Principal Edward Leistman, Carle Place Superintendent Frank J. Flood and the Carle Place Union Free School District as among the defendants. Sulsky still retains her position as English teacher at the school.

The controversy began in 1978 — only one month after Leistman became principal of the Long Island high school. After publication of an article in the student paper entitled, "Teachers Walk but Want to Talk," detailing teachers' contract negotiations, Leistman ordered all subsequent issues of *The Crossroads* be submitted to him for prior review.

Since then, Sulsky said she has continually fought for authority to protect the First Amendment rights of both her students and herself. Her suit cites 11 incidents in which Leistman ordered Sulsky to change or delete articles and advertisements. In addition, her suit notes an oral reprimand by Leistman after a student reporter requested a copy of the school district's annual budget for an investigative assignment.

Other articles which Leistman ordered deleted or censored discussed the drafting of women and a report of the high school's Scholastic Aptitude Test (SAT) scores, Sulsky said.

But in each occurrence of censorship, the principal failed to show that publication of the articles in *The Crossroads* would cause a material and substantial disruption of school activities, noted Thomas Liotti, attorney for Sulsky. Such a procedure is required by the courts to justify censorship of non-libelous and non-obscene material in student newspapers.

The main issues before the court are whether Sulsky has First Amendment rights as an adviser and whether such rights were violated by the principal's actions.

The school officials contend that Sulsky does not have a First Amendment claim by virtue of her position as adviser, since no speech or writing of her own is involved in the production of *The Crossroads*. Therefore, they argue, the principal's decisions to censor the paper do not abridge Sulsky's free press rights.

In her complaint, Sulsky said she exercised her own free speech rights in the use of her assistance and association with the student newspaper and through her refusal to censor at the request of the principal.

To support this claim, Liotti noted a federal court's decision made in *Bertot v. School District No. 1*, 522 F.2d 1171 (10th Cir. 1975), which states that an adviser's acts of "assistance and association" with a student publication are protected, although no writing of her own may be involved.

Sulsky also claimed Leistman's actions had a direct impact on student reporting.

"Due to the chilling effect of the principal's reprimands, students shrank from publishing their articles and feared retaliation if they instituted complaints," she added.

School officials stated that if students' rights were abridged by the principal's censorship demands, it would be "a matter for a member of the student staff or the student audience" to raise a complaint.

Liotti argues that Sulsky has standing to defend the First Amendment rights of her students. He cites as persuasive precedent the Colorado Supreme Court decision in *Olson v. State Board for Community Colleges and Occupational Education*, 687 P.2d 429 (Colo. 1984), which granted advisers standing to file a First Amendment claim on behalf of their students *(see story this issue)*.

To establish standing, Liotti said Sulsky must satisfy three elements of the doctrine known as *jus tertii*, which allows an individual to sue on behalf of the rights of a third party.

The first element involves the presence of a substantial relationship

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between the asserter and the third party.

According to Liotti, Sulsky satisfies the first element of third party standing by virtue of her position as adviser of *The Crossroads*.

"It would have been extremely difficult for the student writers to enjoy their First Amendment rights without the aid and support of the faculty adviser and the existence of a genuine pupil-teacher relationship," Liotti said.

To satisfy the second element, Sulsky must show that the enjoyment of the third party's rights is inextricably bound up with the activity which she, the asserter, wishes to pursue.

Liotti contends here that Sulsky, as adviser, satisfies the second element of the doctrine because she defended — and avoided restraining — her student's First Amendment rights "in the face of the principal's demands to unconstitutionally infringe upon those rights."

The final element of the doctrine requires that there exist a difficulty or improbability of these third parties in asserting the alleged deprivation of their own rights.

Liotti argues that because students' individual First Amendment claims are rendered moot by graduation but censorship has a "continuing inhibitory effect" on the rights of present and future students' rights, the third element of the doctrine is satisfied.

Principal Leistman maintained that Sulsky was removed from the adviserships as a result of her "deteriorating role as an adviser," but did not elaborate on how he perceived that role.

The school district filed a motion for summary judgment in April, asking the court to dismiss the case before it goes to trial. The court has not yet rendered a decision. ■

Colorado

Adviser cites censorship in dismissal

An award-winning journalism teacher dismissed from Bear Creek High School is seeking support from the Colorado Education Association in her quest to end censorship of "gutsy" editorials in the student newspaper.

Charlotte Norton, a journalism teacher and adviser at the school for two years, is appealing her dismissal in state court, claiming she was oppressed for refusing to censor the student newspaper, *Bear Facts*. Her attorney, William Bethke, said she also plans to file a defamation suit against the principal.

Norton was dismissed in June for misconduct after she admitted buying beer for two students, asking them to perform personal errands for her during school hours and using profane language in the *Bear Facts* newsroom.

"I made an error in judgment," Norton explained. "But this whole case stems from censorship of the high school paper. If I hadn't been the newspaper adviser, this [investigation] wouldn't have happened."

Principal Maran Doggett said in a *Denver Post* article that although he approved of Norton's teaching methods, he requested her dismissal because her actions "were unbecoming to any professional."

But Norton maintains that Doggett was "out to get her" dismissed as adviser. "Through his constant investigations and probing of students," she said, "he finally found something."

In 1983, Norton was nominated for the Colorado High School Press Association's Journalism Teacher of the Year award, and received the Distinguished Adviser Award. Under Norton, *Bear Facts* twice won the All-American Award from the National Scholastic Press Association.

After a three-month investigation of Norton's tenure at Bear Creek High School, Superintendent of Schools John Peper filed charges in December against the teacher. The board of education accepted the charges and solicited the opinion of Judith Schulman, a hearing officer at the Colorado Department of Administration.

In her 29-page report, Schulman noted that Doggett became "extremely angry" and voiced his concerns to Norton and the editorial staff on several occasions when the student paper's editorials contained negative comments about the school district or administrative actions.

Doggett had also ceased distributing *Bear Facts* to the community, claiming the monthly paper was "just too controversial," according to the report.

"It is apparent that from the beginning of his tenure as principal at BCHS, Dr. Doggett took a different view than Norton as to exactly where the balance would be struck between student journalistic interests and independence and the interests of the administration," the report read. "Doggett clearly wanted Norton to take a stronger stand in directing students to reflect a positive view of administrative actions and activities than Norton felt was either necessary or appropriate."

However, the hearing officer concluded that "whatever concerns Doggett may have had regarding the content of *Bear Facts* had no influence whatsoever on either initiating or conducting the investigations concerning Norton . . ."

Norton said in a *Rocky Mountain News* article that she was surprised by the school board's decision to dismiss her.

"I thought they would see beyond this," she said. "To me, the school board copped out. The whole notion of censorship was completely covered up."

Bethke said he is now preparing documents for the appeal. A court date has not been set.

■

Colorado

Paper challenges funding cut-off

A journalism teacher at Pikes Peak Community College (Colo.) is continuing a six-year court battle to reestablish funding for the student newspaper after gaining the right to defend the First Amendment rights of her students.

Judith Olson, adviser to the *Pikes Peak News*, and three student staff members sued the State Board of Community Colleges and Occupational Education after the student senate terminated funding of the paper.

The case, scheduled to come to trial October 15, has already provided a landmark decision by the Colorado Supreme Court allowing an adviser to sue on behalf of her students. The decision is binding in Colorado and may set persuasive precedent for the rest of the country.

The issue now before the trial court is whether the students' rights were violated by the funding cutoff.

William Bethke, attorney for Olson, filed a motion for summary judgment in May, claiming that a "substantial and motivating factor" in the student government's funding cutoff to the *News* was its disagreement with the paper's reporting and editorial policies.

Olson is asking the court to declare that the cutoff is a violation of the First Amendment rights of *Pikes Peak News* student editors. Her attorney cites as persuasive precedent the federal court decision in *Joyner v. Whiting*, 477 F.2d 456 (4th. Cir. 1973), which ruled that censorship of constitutionally protected expression cannot be imposed by withdrawing financial support.

Attorneys for the defendants, however, said it is unclear whether the *News* content was a substantial factor in the senate's decision to terminate funding to the paper.

The conflict arose in 1979 when student senate members terminated funding to the *Pikes Peak News*, claiming that the paper printed "libelous" articles and that its content was not representative of the student body.

Because of the funding cutoff, the *News* folded and was replaced by the *Pikes Peak Fuse*, a low-budget magazine funded by advertising revenue and the college operational budget. Olson, who continued as adviser, modified her journalism design class to facilitate production of the *Fuse*.

In August 1979, Olson and three students filed suit in Colorado District Court against the State Board of Community Colleges and Occupational Education, claiming the senate's funding cutoff violated the First Amendment rights of both her students and herself.

In her complaint, Olson claimed that the senate's actions had a chilling effect on the free speech rights of her students. She also argued that the student government actions had restricted her ability to teach First Amendment values because the *Fuse* contained 90 percent less content than the *News*.

The court granted summary judgment in favor of the board, ruling that Olson lacked standing to challenge the funding cut. It held that she preserved no constitutional right to use the paper as a teaching tool or to assert the First Amendment rights of her students.

Olson pursued the case to the appellate court and to the state supreme court where she was granted the right to sue on behalf of her students. The three students had graduated and did not join her in the appeal.

In determining whether Olson had standing to challenge the funding cut on behalf of her students, the Colorado Supreme Court stated that Olson must meet at least one of three criteria used to establish a third party claim.

First, the court held that Olson's role as faculty adviser established a "substantial relationship" between herself and her students, rendering Olson "as effective a proponent of First Amendment rights of her students as the students themselves."

Fulfillment of this factor alone could grant Olson the right to sue on behalf of her students, the court held.

continued

However, the court stated that Olson had also satisfied the remaining criteria of the test.

In assessing the second criterion, the court noted that because Pikes Peak college is a two-year school, students only had a "brief tenure" in which to initiate and bring to conclusion a lawsuit without their individual claims being rendered moot by graduation. Although other students could be substituted as plaintiffs, the court held that there was sufficient difficulty or improbability in the students asserting their own rights.

"There is little lost in terms of effective advocacy by allowing Olson as teacher and faculty adviser to assert the rights of the students," the court said.

The final consideration concerned the question of the students' rights being "inextricably bound up" with Olson's efforts to prohibit termination of funding to the *Pikes Peak News*. In addressing this criterion, the court stated that the funding cutoff could have an inhibiting effect on students' ability to exercise their free speech rights, and that the students' constitutional interests could be diluted in the event Olson was not granted standing.

However, the supreme court reversed the lower court's ruling that Olson's own First Amendment rights were violated by the funding cutoff to the *News*, noting that the First Amendment does not give Olson the right to require the school to allocate funds to the newspaper when it is not part of the official curriculum.

Bethke said that if the district court grants summary judgment in favor of Olson, he would then request a trial to determine the reinstitution and funding of the *Pikes Peak News*.

Olson's attorneys said they will ask the court for compensation covering the years the paper did not receive its funding, which would then be used to produce the *News* at the caliber it maintained before the funding cutoff. ■

California

Student government faces lawsuit

Editors of the University of California — Irvine student paper, *New University*, may join a suit against the student government after it confiscated 5,000 copies of the paper because it contained student election endorsements.

University editor Danny Sullivan said the endorsements appeared in *La Voz Mestiza*, an alternative student quarterly that was inserted in an issue of the *University*. As a result of the paper's endorsements, the student government declared the elections void and rescheduled new elections, according to Sullivan.

Gaspar Copado, editor of the *Mestiza*, could not be reached for comment.

The *Mestiza* is completely funded by the student government, Associated Students of University of California-Irvine (ASUCI). The *University* receives approximately eight percent of its $155,000 budget from ASUCI.

A communications board is responsible for overseeing the student papers' operations, Sullivan said. Board members include the editors of all student publications, the student body vice president and the administrative vice president, according to Sullivan. Editors of the student paper are nominated by the communications board, but must gain the official approval of the ASUCI before they are instated.

The board, which has been active since January, has set no guidelines for what can or cannot be published in student papers. However, it has suggested that the papers provide equal access for all viewpoints.

Both the *Mestiza* and the *University* have contacted the American Civil Liberties Union, and the *Mestiza* has reportedly filed suit against ASUCI. Although the *University* has not joined the suit against the student government, Sullivan said the paper "certainly supports" the suit. ■

California

Associated Students takeover bid quashed by university president

California State University — Dominguez Hills President Robert Butwell has unveiled a plan to drastically change funding and control of the campus newspaper to upgrade its quality and remove it from the threat of student government control.

Beginning this fall, the *Bull's Eye* will no longer receive funds from the student government, Associated Students at California State University — Dominguez Hills (ASCSUDH). The paper normally receives half of its $30,000 budget from the student government.

Instead, Butwell said the paper will be financed by school funds and *Bull's Eye* advertising revenue, according to his three-page statement.

The university president also plans to give control of the publication to a media advisory board composed of faculty, student and professional journalists, students outside the communications department and alumni. The board's responsibilities will include developing a process for selecting editors, determining frequency of publication and finding ways to increase the paper's advertising revenue.

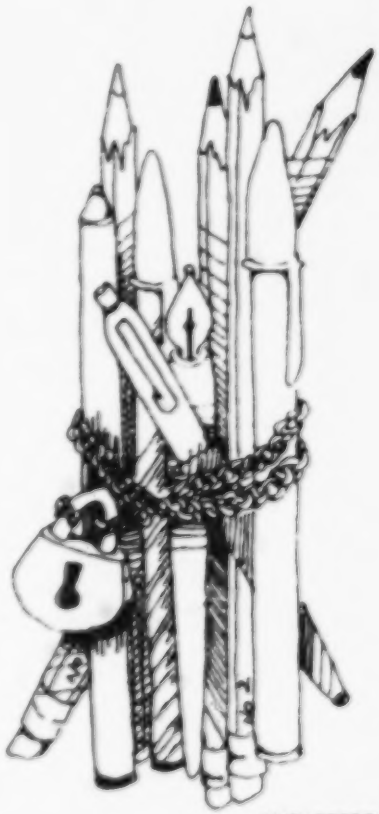
Butwell is also conducting a national search to replace David Safer, former communications department chairman. The new department head will be given "a specific mandate to make our paper one of the best" in the 19-campus California State University system, Butwell said.

Bull's Eye staff members could not be reached for comment on Butwell's plan.

The changes in funding and control of the *Bull's Eye* were prompted by an attempted student government takeover of the paper. Butwell, who has final word on all legislation passed by the ASCSUDH, rejected a revised publications policy, proposed by ASCSUDH president Louis Armmand, which called for a structural reorganization of the Student Publications Commission and a shift of control of the *Bull's Eye* editorial and hiring policy.

The university president convened a panel of two journalism professors in March to review the proposed policy and offer suggestions on who should oversee the paper.

Panelists Jay Berman, adviser for the *Daily Tital*, the campus newspaper at CSU — Long Beach and Barbara Fryer, adviser for the *Daily Forty-Niner* at CSU — Fullerton said they believed passage of Armmand's code would have given rise to "chilly climates" within the student press at CSU — Dominguez Hills.



MARY DRISCOLL

"The policy was vague where it should have been specific," Fryer said. She noted that Armmand's proposed restructuring of the Student Publications Commission detailed suspension and termination procedures of commissioners, but it failed to offer grounds for "such drastic actions."

"This could easily give rise to terminations being arbitrarily enforced, creating a chilly climate for editors and reporters who must be free of intimidation if they are to do their jobs properly," Fryer said in a draft of her analysis.

Fryer added in an interview that although the code specified procedural appointments of commissioners, it failed to suggest journalism experience as a prerequisite.

"We thought control [of the *Bull's Eye*] would be stacked on those who know little or nothing about journalism," she explained.

Bull's Eye staffers believed Armmand's code would restrict their free speech and free press rights. They had threatened to sue the student government if it had approved the code.

Armmand and the ASCSUDH called for control of the Student Publications Commission which in turn would control the *Bull's Eye*. The code would have allowed the commission to hire and fire newspaper editors and suspend news staff members if it believed the paper had not provided "fair, accurate and balanced" reporting.

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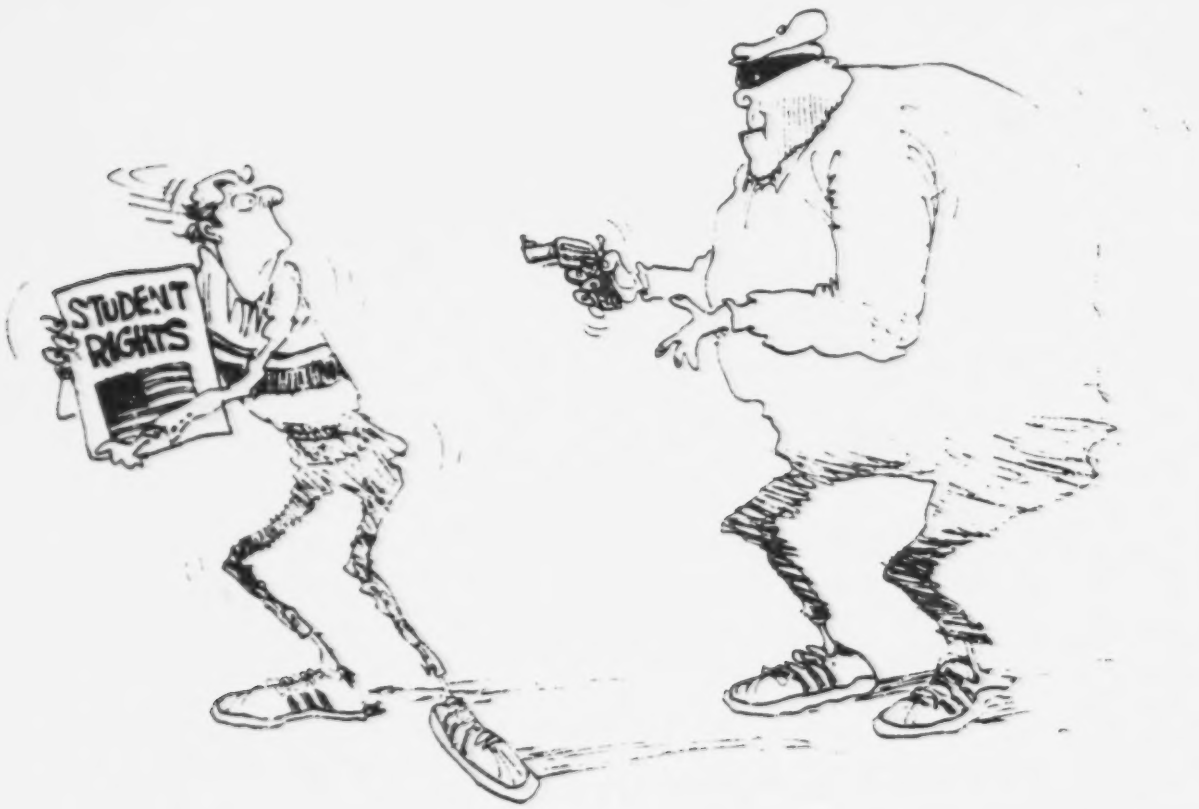


The code also would have shifted control of the paper's editorial policy to the publications commission. The ASCSUDH would directly or indirectly appoint four of the five voting commissioners and would eliminate as voting members the editor and adviser of the paper.

According to a *Los Angeles Times* article, Nancy Harby, then editor-in-chief of the *Bull's Eye*, believed the ASCSUDH intended, via its proposed publications code, to lay the groundwork for future political control of the paper by attempting to "dictate" editorial policy. Harby mentioned that several *Bull's Eye* articles and cartoons published last year criticized Armmand's "dictatorial" style of leadership.

Several letters to the editor dubbed him "Idi Armmand" and "Louis Amin," likening him to the deposed African dictator Idi Amin. Harby suggested that Armmand may have proposed the code to punish the paper.

Armmand said *Bull's Eye* reporters relied on "questionable facts" in articles about him, but denied any personal interest in the student government's effort to gain control of the paper, according to the *Times* article.

The ASCSUDH leader also denounced the paper for its lack of "systematic coverage" of events and issues important to the student body, "incompetent" business management, and propensity to feature "one-sided, bellicose" attacks on student officers.

"What's surprising is that the paper has been allowed to go on this way for so long," Armmand said.

After battling the student government for control of the *Bull's Eye*, adviser Candy Nall and Harby resigned their posts in March, just weeks before Butwell announced his ambitious efforts to reorganize control and funding of the paper. Nall said she quit because the university administration had allowed student officers to "run the campus."

"I cannot provide quality instruction to my students when the administration prefers to indulge the petty tyrannies of a power-hungry Associated Students officer rather than defend the academic rights and freedom of students enrolled in the official [journalism] course," Nall wrote in her resignation letter. She is now with the journalism department at CSU — Fullerton.

Harby was unavailable for comment, but Nall said Harby resigned due to similar frustrations and "for personal reasons."

The media advisory board is already discussing revisions to the campus publications code, according to Safer. The code will define more precisely the responsibilities of the paper's editors, he said, and will seek to foster "mutual discussion of editorial policy" by *Bull's Eye* staff members.

Safer said he could not discuss the specifics of the code's revisions because they have not been formally approved, but remarked that "the whole direction is positive."

Although the current code recommends that published material be "in good taste," Safer said the board does not plan to include guidelines as to what material can be prohibited from publication. ■

New Jersey

'Student romance' sparks libel suit

A Madison (N.J.) High School student and her father are suing the student newspaper for compensatory and punitive damages, claiming that an article concerning student romance between classes damaged their reputations.

The libel suit springs from a June 1984 article in the *Dodger* entitled, "Student Romance Gives Hallway 'R' Rating." Madison student Danielle Romano appeared with a male student in the accompanying photograph, with a caption that said the two students were displaying feelings of affection between classes.

In their complaint, Romano and her father, Louis, charge that the article, picture and caption collectively were "false, misleading, libelous and slanderous," and were published "maliciously and with intent to injure" Danielle Romano.

The suit further alleges that the younger Romano had suffered humiliation, ridicule, and emotional and physical injury as a result of the *Dodger's* article. Her father claims that the publication caused him embarrassment and has "brought [him] into public disgrace and infamy amongst his neighbors and in his community."

The male student with whom Romano appeared in the photograph reportedly has not taken legal action.

The suit, filed in New Jersey Superior Court in January, names as defendants the Madison Borough Board of Education, former adviser Angela Cosimano and *Dodger* reporter Dianne Krickus. A court date has not yet been set.

In clarifying his position, Romano said he believed readers would automatically associate his daughter with the subject of the article.

"The picture didn't bother me, and the article didn't bother me," he explained. "It's placing the picture under the article that bothered me."

Romano added that he considered it "poor judgment" to "single out two people who are not aware of what the picture is being used for."

But Cosimano maintains that the *Dodger* is a "careful paper."

"We go out of our way to print only the facts, and not to damage anyone's reputation," she said, adding that she believes the suit lacks merit.

School board attorney David Rand agrees, saying the suit is "ridiculous."

"It has been blown utterly out of proportion," he said. "I have absolutely no belief that there is any basis for those allegations in fact."

Rand also questioned the Romanos' decision to name Krickus, who wrote the article, as a defendant. "If you look at the involvements" in placing the article with the photograph, he noted, Krickus is the "most remote" from liability.

"The article was published in good faith . . . we believe that our people will be vindicated," Rand said. He declined comment on the specifics of his defense.

In mid-March, the Madison school board proposed its first publications policy for the district. According to Cosimano, the current president of the New Jersey Press Association, the *Dodger* has not operated under a written set of guidelines in its 25-year history.

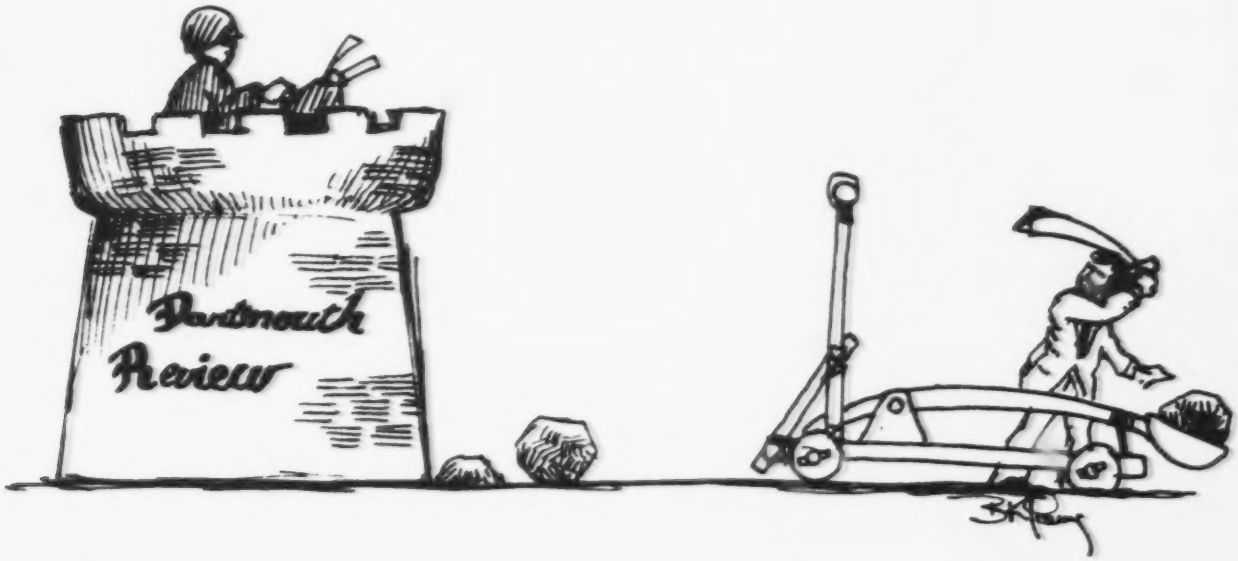
Cosimano pondered the timeliness of the policy, as board officials introduced it just two months after the Romanos filed suit against the *Dodger*. "I think it's more than coincidental," she said.

The policy introduced in March met with staunch resistance from parents, teachers and students in the district, who rallied against it at a subsequent board meeting, according to Cosimano. The main reasons for resistance to the policy, she said, were that it permitted prior review by the principal and prohibited publication of material "deemed harmful to impressionable pupils."

The board agreed to remove the above provisions and adopted the policy in May. Under the new policy, the adviser holds official authority to review material before publication. Cosimano said this has been an informal practice since the *Dodger* was established.

But concerns remain over the constitutionality of the board's policy, which prohibits publication of material considered "grossly prejudicial to an ethnic, national, religious, or racial group or to either gender," and material which "seeks to establish the supremacy of a particular religious denomination, sect, or point of view over any other."

Although the policy also prohibits publication of obscene, libelous or slanderous material, Cosimano noted that it fails to provide specific definitions of such material. Accordingly, she said, Madison students will not be made aware of the legal standards ordinarily used to define obscenity or libel. ■



New Hampshire

Professor drops $2.4 million suit

A Dartmouth College music professor has dropped his $2.4 million libel suit against the Hanover Review, Inc., publisher of the *Dartmouth Review.*

William Cole, music professor and chairman of the music department at Dartmouth, had accused the *Review* of actual malice after it published a January 1983 article questioning his teaching methods.

The article, entitled, "Prof. Cole's Song and Dance Routine," described Cole's course as "renowned to be the most outrageous gut course on campus, home of the thicknecks," adding that, "Nothing worries Bill Cole. Not regulations, not teaching. Nothing."

According to a statement announcing termination of the two-year-old suit, Cole, who is black, considered the article "racially motivated and unfair and inaccurate both in its descriptions of him and its characterization."

The *Dartmouth Review*, a conservative weekly published by students independently of the college, maintained that it made efforts to contact Cole for comment prior to publication of the article and invited him to respond after it was published, according to the statement. Cole had declined response on the advice of legal counsel.

"The *Review* has vigorously defended its article and its First Amendment right to report on matters of interest and concern to the Dartmouth community," the statement read, adding that the writers made efforts to allow readers to reach their own conclusions.

But the publication has not seen the last of libel suits. Although Cole dropped his suit in May, the *Dartmouth Review* faces a $3 million libel suit filed in March by Richard Hyde, associate chaplain and professor of religion at Dartmouth.

Hyde claims that several articles published in the Review contained "false, misleading and inflammatory" information which threatened his personal and professional reputation and position at Dartmouth College. He also claims in the suit that the articles constituted an invasion of privacy.

One article referred to an April 1983 lecture Hyde delivered entitled, "A Christian Understanding of Love and Sexuality." The article, which appeared in a satire column entitled, "The Dartmouth Liberation Front," said Hyde "sometimes has a good word for the North American Man-Boy Love Association, which may be his idea of perfected Christianity. Last fall he married a girl he had met only six weeks earlier."

Although the article also satirized other Dartmouth officials, none have reportedly filed suit.

According to Peter Hutchins, attorney for Hanover Review, the articles cited by Hyde are privileged and qualify as fair comment since they refer to comments the professor made during a public lecture. Further, since the articles are "clearly satire" and were not published with actual malice, they cannot be considered defamatory or actionable, Hutchins said in his brief.

A court date in New Hampshire Superior Court has not yet been set. Hutchins said the Hanover Review may file a motion for summary judgment, asking the state court to dismiss the suit in favor of the *Dartmouth Review* before the case goes to trial. ■

Editors battle multiple libel suits

Daily Iowan awaits trial

Student editors at *The Daily Iowan* are facing a $200,000 libel suit after they reported several criminal complaints allegedly filed against an Iowa City police officer.

Police Officer Daniel Dreckman, who filed the suit in June 1983, is charging the paper with defamation, actual malice, and negligence. The suit is pending in district court.

The controversy began in October 1982 when the *Daily Iowan*, an independently incorporated publication staffed by University of Iowa students, published an investigative story describing an assault charge filed by Cathy White against Dreckman which was dismissed later that year. The article quoted Thomas Mikelson, president of the Iowa City branch of the National Association for the Advancement of Colored People, as saying that a similar assault complaint had been filed against Dreckman that summer.

Dreckman contends in his suit that no criminal complaints other than the one brought by White have been filed. He maintained that the paper should have verified the accuracy of Mikelson's statements.

Dreckman's suit names as defendants the *Daily Iowan* and Mikelson. ■

'Beer and munchies' contractor brings suit against State News

Student reporters at Michigan State University are awaiting a court date for a libel suit brought against them after they published a series of investigative stories in 1983 describing "highly questionable" expenditures of university funds by an ecological data management firm.

Robert Boling, president of Eco-Tech, Inc., filed a $10,000 libel suit against *The State News* in state court after the student newspaper alleged that his company was using funds from a $227,000 university contract toward "fringe benefits" such as "beer and munchies."

The articles, based on an MSU internal auditor's report, also accused Boling of billing the university for his brother's airplane tickets.

The company president said in his complaint that the *State News* "refused" to print retractions of its allegations after he informed the paper of its "false and defamatory" information. Boling noted that professional newspapers which had picked up the stories complied with his request to print retractions and discontinued printing the series.

Attorneys representing the *News* contend that the paper did not publish retractions because Boling failed to specifically mention anything materially false contained in the articles. ■

$9.1 million suit pending

A student at William Rainey Harper College (Ill.) is facing a $9.1 million libel suit after writing a pointed commentary about his journalism professor in the student newspaper.

The debate arose when senior Michael McCarthy wrote a guest column in the May 1983 edition of *The Harbinger*, reflecting on his experiences at Harper College, citing problems he perceived at the school and criticizing Professor Henry Roepken's academic performance.

In his column, McCarthy, who has since graduated, included a paragraph describing Roepken as a "very foul-mouthed journalism instructor who always hated student-run operations if they weren't run HIS way, and held it against his students if they professed their allegiance to that organization . . . "

McCarthy further described Roepken as "the most disgusting, hardheaded, stingy instructor I know," and concluded with, "As the saying goes, if you can't; teach!!"

Roepken, who is also a professional broadcaster, filed the suit in state court in January 1984 claiming that McCarthy's remarks were calculated to injure his personal and professional reputation. The judge dismissed the suit.

Roepken appealed the decision in August of that year, naming as defendants McCarthy, the editors and adviser of *The Harbinger*, two administrators, Harper College and the board of trustees.

In his appeal brief, Roepken claims the comments made in McCarthy's column implied that the professor acts unethically as a teacher and incompetently as a journalist. Roepken contends that McCarthy's statements falsely and maliciously damaged his reputation as a private citizen.

But Sarah Sotos, an attorney for Harper College and *The Harbinger*, said McCarthy's comments constituted "mere name calling," and as such were neither defamatory nor actionable.

A hearing for Roepken's appeal has not been set. ■

Who really pays for libel?

Liability and the student press

In the last two decades, a new type of student journalist has evolved. Rather than reporting only who won the last basketball game or who has the nicest car on campus, these journalists cover important and controversial issues. At the same time, the student journalist takes the risk that by probing into such things as corruption, teacher competence, or sexual assault, the subject of an article will sue for libel. But is it really the reporter who runs the risk of liability for defamatory remarks in the student paper? Or is it the paper — or the school — who ends up actually paying?

In contrast to the hundreds of cases filed against professional newspapers in one three-year period,[1] the several dozen suits filed against student publications in the last 10 years seems small. In comparison to the number of libel suits filed against student publications in the 45 years before 1975, however, there is a significant

I—LEGAL ANALYSIS

increase. Between 1930 and 1975 only 19 libel suits were brought against student publications.[2] Money damages were paid in only seven of these cases, six of the cases being settled out of court, and one case being fully tried.[3] Twenty-eight libel suits reported to the Student Press Law Center have been filed since 1975, a warning to student journalists and schools, as well as a reminder of how litigious our society has become. Few people who believe they have been defamed will consider an apology sufficient remedy. Widely publicized libel cases, such as Carol Burnett's suit against the *National Enquirer*,[4] and Miss Wyoming's case against *Penthouse*[5] have created recognition of the potential for handsome compensation for libel, at least against the professional media. What effects do large libel suits have — or should they have — on high school and college publications? To answer this, it is necessary to step beyond the figures and analyze where the money paid for libel suits is coming from and why it is coming from those places.

The 28 libel cases of the past decade (see chart) present a clear pattern. The person alleging libel often sues for an amount far in excess of any actual damages — in 17 of the cases, the relief sought was $100,000 or more. The plaintiffs who believe they have been libeled will often sue individual and organizational defendants; in 12 of the cases, the reporter was sued, in five of the cases the student editors were sued, and the faculty adviser was sued in six cases. The school paper was named as a defendant most frequently — a total of 14 times. The school itself was named in a suit a total of eight times. While nine of the cases are still pending, the 19 concluded cases present interesting results. Of those 19 cases, five were dismissed either on summary judgment (there was no material issue of fact to be decided by the jury) or for failure to continue the suit. Of the five cases that were fully litigated, three were won by the paper. All of the remaining nine cases were settled out of court, with the plaintiff receiving some amount of money. Of those settled, only two were settled for payments in excess of $10,000 — one for $14,000 and one for $50,000.[6] In other words, in 19 cases collectively seeking more than $62 *million* in damages, payments for the 11 cases won by plaintiffs totaled only $96,550. The nine cases still pending seek nearly $95 million in damages.

The exorbitant damage figures batted around in libel suits are typical of lawsuits in general, and the money actually paid indicates that the fear they cause is exaggerated. The plaintiff's hope is that the high figure will do one of two things. First, a defendant will see imminent bankruptcy looming after a long and expensive court battle, and quickly attempt to settle the case for a considerably smaller amount than that originally sought. And second, the plaintiff hopes that by asking for outrageous damages, he will at least be awarded big damages. What usually happens is the plaintiff is granted his first hope and is usually as willing to avoid going to court as the defendant. The fact is that plaintiffs awarded damages in 11 libel suits collectively received approximately one tenth of one percent of damages requested.

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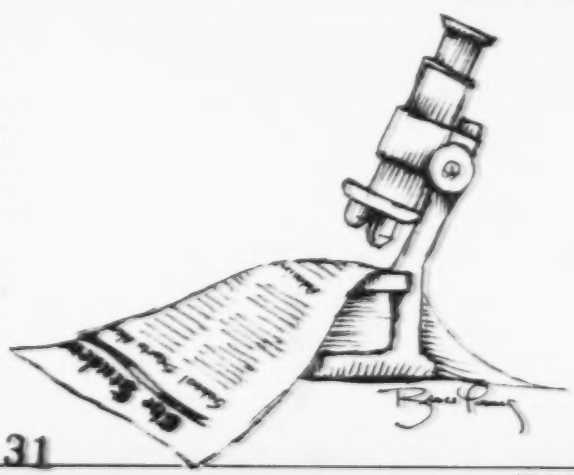

This outcome is comparable to the results found in Professor Marc Franklin's 1981 litigation study of libel suits against professional publications,[7] in which he reported that a large majority of plaintiffs lose their libel cases. Franklin also found that plaintiffs are rarely compensated through a final judgment in a trial, but rather that compensation came through some sort of settlement. One libel insurance company's data showed that of 110 cases closed in 1979, 25 were dropped by the plaintiff, 30 were settled for some type of payment (ranging between $300 and $50,000) and 55 were tried in court. Of those tried, 20 resulted in summary judgment for the defendants, 22 defendants won on motions to dismiss, five won directed verdicts, (verdicts given by the judge without ever going to the jury), and five won jury verdicts. In sum, of the 55 cases that were actually litigated, libel plaintiffs won only three. The results were equally as dismal for plaintiffs on the appeal level.[8]

There are several explanations for why plaintiffs so rarely see their case reach either a final judgment in their favor or a final judgment at all. Current libel law, as discussed elsewhere in this *Report*, makes it very difficult for a plaintiff to recover damages, especially if the plaintiff is a public official or a public figure. Also, it is often desirable for both parties to settle before the case goes to trial because of the high legal costs involved. The expense of defending a libel suit, whether won or lost, is estimated

continued

Libel suits filed since 1975

year	publication/school	those sued	amount	outcome	notes
1975	**Daily Iowan** Univ. of Iowa	paper	unknown	$3,000 settlement paid by paper's insurance co.	tavern described as "gay bar"
1975	**Daily Iowan** Univ. of Iowa	paper	unknown	paper won	brought by developer of Dalkon Shield
1976	**Lantern** Ohio St. Univ.	reporters, adviser	$860,000	$2,500 settlement paid by paper	remarks concerning local landlord
1976	**Kaiman** Univ. of Montana	reporter, paper	$102,000	$14,000 settlement paid by school's insurance co. and student government	remarks concerning paper's print shop
1977	**State News** Michigan St. Univ.	paper	$2.5 million	case dismissed	remarks concerning baseball player
1977	**State News** Michigan St. Univ.	paper	$1.65 million	$50,000 settlement paid by paper's insurance co.	remarks concerning shooting by police officer
1977	**Crimson White** Univ. of Alabama	no formal lawsuit	$10,000	$3,000 settlement paid by school's media planning bd.	remarks made in "valentine"
1978	**Daily Illini** Univ. of Illinois	reporter, publisher	$250,000	case dismissed	remarks concerning business' failure to pass on manufacturer's discounts
1978	**Daily Iowan** Univ. of Iowa	paper	unknown	$250 plus costs paid by paper	letter labeled "Bloody Zionist"
1978	**Pipe Dream** State Univ. of N.Y.-Binghamton	state	unknown	case dismissed	forged letter identified writer as gay
1979	**Daily Chronicle** Univ. of Utah	reporter	$52 million	$4,000 settlement paid by school's insurance co.	remarks concerning governor's aide
1979	yearbook Port Richmond HS (N.Y.)	bd. of educ.	$1.5 million	pending	"I'm easy" caption on student biographical sketch
1979	**Colorado Daily** Univ. of Colorado	paper, reporter, program director	$500,000	undisclosed settlement paid by paper	remarks critical of a director of a study abroad program
1979	yearbook Christian Cty. HS (KY)	school	$50,000	case dismissed	student's name below picture of dog
1981	**maneater** Univ. of Missouri-Columbia	paper	$120,000	$7,800 settlement paid by school and paper	remarks made in classified ad
1982	**Iowa St. Daily** Iowa State Univ.	paper	$9,000	paper won	see story this issue

to begin at $20,000.[9] For example, in the 1979 case against the University of Utah *Daily Chronicle*, a reporter had printed an article concerning the unethical behavior of a governor's aide. The aide sued after he was dismissed from his job. The reporter was eager to go to court, claiming he had proof of the aide's behavior, and attorneys estimated that the reporter had an 80% chance of winning. But the school chose to settle out of court for $4,000 rather than pay the much higher cost of going to trial.

The Utah case illustrates an interesting point. Although the reporter was willing to go to trial, it was the university that negotiated the settlement. The university probably thought that it would be held financially responsible in the end. Why? A simple answer, of course, is that students, student editors, and even faculty advisers, are usually judgment-proof, meaning they lack sufficient money to pay even a small judgment. A school paper, funded through student fees or advertising revenues, has a larger amount of money. A high school or university has still more. Even better news for a libel plaintiff is that schools and newspapers often carry insurance policies.[10] So if a plaintiff can find some way to bring the school into the suit as a defendant, his chances of actually getting money from a settlement or judgment rise considerably.

Thus, a justification for a school having to pay student libels is the "deep pocket" theory, which is often used in personal injury law making certain parties financially

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year	publication/school	those sued	amount	outcome	notes
1983	**Dartmouth Review** Dartmouth College (NH)	reporter	$2.5 million	case dismissed	see story this issue
1983	**Daily Iowan** Univ. of Iowa	paper	$200,000	pending	remarks made concerning complaints against police officer
1983	**Observer** Southern Univ. of New Orleans (LA)	reporter, editor, state	$4,000	$2,000 damages awarded against students, dismissed against state	remarks concerning instructors
1983	**Lantern** Ohio St. Univ.	reporters, editors, paper, adviser, school, state	$1.5 million	plaintiff loses at trial	remarks concerning bar manager
1984	**Cadaver** Georgia Medical College	editors, adviser	$150,000	pending	comments made in response to a reader's letter
1984	**Harbinger** William Rainey Harper College (IL)	reporter, editors, paper, advisers, administrators, bd. of trustees	$9.1 million	case dismissed, appeal pending	see story this issue
1984	**State News** Michigan St. Univ.	paper	$10,000	pending	see story this issue
1984	**Clipper Courier** Cumberland HS (RI)	reporter, adviser, journalism dept.	$1 million	pending	remarks blasting a school administrator for absenteeism
1984	**Owl** Univ. of Santa Clara (CA)	reporter, editor, univ. pres.	$80 million	pending	allegations made against basketball fan
1984	**Dartmouth Review** Dartmouth College (NH)	publisher (off-campus paper)	$3 million	pending	see story this issue
1985	class project Oriskany Falls HS (NY)	school district	unknown	$10,000 damages awarded	remarks concerning school cook and cafeteria food in newspaper-format class project
1985	**Dodger** Madison H.S. (NJ)	reporter, adviser, bd. of educ.	unspecified	pending	"student romance" caption under photo

List is based on cases that have been reported to the SPLC.

responsible.[12] In essence, this theory involves the search for who is in the best position to pay. The plaintiff himself will usually be forced to absorb the loss to his reputation and career as a result of the libel unless the school provides the compensation. The theory goes that the school is in a better position than the libeled individual to pay for the damage. Moreover, the school is better equipped to foresee and insure against the risks of a libel action than is the unsuspecting victim of a libel. The school can also spread the cost of insurance either by self-insuring or by purchasing the insurance along with other school insurance at a package rate.

Why schools perhaps ought to pay, however, is not the same as why they do end up paying. The reasons they do pay go beyond the fact that student journalists and editors are usually judgment-proof. In the University of Utah case, the plaintiff sued the reporter, not the school, yet the school's insurance company negotiated and paid the settlement.[13] In a suit against the University of Montana's student paper, the *Kaimin*, the reporter, the paper, the university and the student government were sued. Again, the university's insurance company negotiated an out-of-court settlement, of which the insurance company paid two thirds and the student government paid the other third.[14] In a suit involving the University of Missouri-Columbia *maneater*, only the paper was sued, yet the university's insurance policy paid all defense costs. The university and the paper shared the out-of-court settlement payment that was reached.[15]

An idea exists among some school officials that if the school might be liable for what gets printed in the student publication, then the school has the right to exercise prior review to prevent any potentially libelous material from being printed. Potential liability has been used as an excuse to control some student publications. However, the fear operating here on the part of many administrators is largely illusory for public schools in light of court decisions rendered in the past decade.

Ten years ago, administrators' fears of potential liability were not completely ungrounded, due to lack of clear law in the libel area and to the support of some scholarly works published at the time claiming that there were several possible bases for school liability.[16] One of these views considered the school liable under a theory of "vicarious liability," which means holding one person responsible for the actions of another because of the relationship between them.[17] Believing the crux of the issue to be whether or not the school had control over the paper, some argued that the school could be said to "control" the newspaper if it offered financial support.[18]

The assertion that a school which financially supports a publication will be financially responsible for its libelous comments is partially misguided in light of several important cases. Every court which has addressed the issue has declared that public college administrators do not have the power to exercise editorial control over a student publication because the publication is funded and sponsored by the school. In *Joyner v. Whiting*,[19] the editor of the student newspaper sued the university's president, who had withdrawn financial support from the newspaper and had set up a number of encumbrances to prevent the paper from printing and distributing its racially segregationist content. The U.S. Court of Appeals for the Fourth Circuit

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Libel Insurance: The Nuts and Bolts

Should a student newspaper invest in libel insurance? Not necessarily. Insurance can sometimes appear to the plaintiff as a "deep pocket," thus making a paper more vulnerable to attack. Moreover, obtaining libel insurance can sometimes be as difficult as trying to get auto insurance after several accidents.

Understanding the Market

Media/Professional Insurance, Inc. is one of the few companies that sell libel insurance to student publications. William Bauer, the company's executive vice president, says the market for student libel insurance is small because spiraling defense costs do not make the market particularly profitable. According to Bauer, the cost of defending a libel suit is completely unpredictable and varies dramatically.

The most critical factor in rising defense costs has become the increasing difficulty in persuading a judge to grant summary judgment (deciding before trial that the plaintiff does not have a valid case). This difficulty thus forces cases to go through expensive full trials. R.D. Spurling, vice president of Mutual Insurance of Bermuda, has said that since 1975, the cost of libel suits can best be described as "an uncontrolled fire storm."

Securing the Insurance

Insurance companies have thus had to take definite steps to keep costs down. Bauer says that each new insurance applicant is carefully screened. Old copies of the publication are reviewed for quality and content. A paper with a heavy emphasis on investigative reporting, for example, may have a difficult time obtaining insurance because the risk of suit is higher. The "claims experience" of the publication is also reviewed: companies may ask if the paper has been sued before, and if so, how often. An independently incorporated paper in particular may experience difficulty in securing insurance because some companies, such as Media/Professional, require a minimum financial stability level to ensure the paper's ability to pay

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squarely held that public colleges and universities are not immune from complying with First Amendment protections, and thus cannot restrict or suppress publication merely because their officials dislike the content of the editorial comments, regardless of whether they financially support the paper.

The issue of whether a public school can be held responsible for a student publication's libel was addressed in the 1978 case *Mazart v. New York.*[20] Plaintiffs brought suit against the state of New York for a libelous letter printed in a state university's student newspaper. The court dismissed the case against New York, finding that because the state did not direct or participate in publication of the newspaper and could not exercise prior restraint, it thus could not be held responsible for anything printed therein. In *Milliner v. Turner,*[21] a 1983 Louisiana case, state college faculty members brought a defamation action against student reporters, who had printed articles in the school paper describing one plaintiff as a "proven fool," and another as a "racist." The court found that the choice of material to go into state college newspapers was an exercise of editorial control and judgment, and regulation of this process by college administration officials would be inconsistent with First Amendment guarantees of a free press. The court found that the relationship between a university and its student newspaper was not analogous to a private publisher and his or her newspaper, since publishers may censor as much as they like. But public universities are almost completely barred from censoring their student papers because such prior restraint would impede the free flow and expression of ideas. The court then concluded that because the First Amendment barred state colleges from exercising anything but advisory control over student newspapers, *these colleges could not be held liable for any defamatory articles in the student newspaper.*

The question of whether prior restraint is constitutionally acceptable in the special circumstances of a high school environment has been litigated several times in recent years, and different courts have given different

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both its premiums and its deductible.

Factors Affecting Insurance Rates

If a publication is accepted for insurance, its premium may also depend on factors such as geographical location and size of circulation. For example, Bauer says that premiums for publications in California are higher than average due to the state's "notoriously large" jury awards. Texas, Oklahoma, and North Carolina's state libel laws appear to be less favorable to defendants than federal law, so premiums in those states are higher as well. The circulation of the paper also affects the premium — the larger the circulation, the bigger the risk of a large damage award, thus, the bigger the premium.

The Insurance Policy

A standard insurance policy will usually have a minimum "deductible" of at least several thousand dollars. This means that if the newspaper is sued it must pay a set amount before the insurance company begins to pay. Media/Professional's standard deductible is $5,000 with higher deductibles available. Mutual Insurance of Bermuda has initiated a plan that has the newspaper pay 20 percent of the defense costs in excess of the stated deductible. This enables the company to offer insurance at a manageable price and gives the insured greater responsibility in monitoring defense costs.

The average policy will cover between one and two million dollars worth of liability. Like the deductible, however, higher "caps" can be purchased. A standard policy covers libel, slander, copyright infringement, invasion of privacy, and the additional suits that are often closely linked with cases such as emotional distress or outrage.

Not nearly as many suits are brought against student publications as against professional publications, but when they are, such suits can be just as expensive. Insurance can be one way of alleviating the costs, but there are other alternatives available, such as self-insurance and consulting legal professionals before publishing something potentially libelous. Responsible journalism includes weighing the pros and cons of each alternative against the specific needs of your paper. ■

answers. The U.S. Court of Appeals for the Seventh Circuit, which binds Illinois, Indiana and Wisconsin, has held that prior review in high schools is not permissible, which would seem to place high schools in those jurisdictions on the same footing as public universities.[22] A majority of the courts, however, have allowed prior review for potentially libelous material provided it was accompanied by proper procedural safeguards to ensure evenhandedness and uniformity.[23] Both *Mazart* and *Milliner* rely heavily on the fact that colleges in those cases *could not* constitutionally prevent publication of a libel even is they wanted to. This suggests that in states where prior review has been approved for public high schools, and at all private colleges, the school could be held responsible for defamatory statements in the student newspaper.

One other way a public school might be protected from liability is through the doctrine of *sovereign immunity*, which applies only to state institutions. Sovereign immunity prevents a plaintiff from suing the state without permission of the state. The pivotal case in this area is *Applewhite v. Memphis State University*.[24] The court found that Memphis State University was protected from a libel suit because it was part of the state. However, because the university press was separately incorporated, the court found that it could be sued. Sovereign immunity for states has been on the wane the last few years, however, and even when still used, public colleges and universities have often been exempted.[25]

So how can a school walk that fine line of protecting itself while at the same time respecting students' free expression rights? The cases seem to indicate that public colleges and perhaps public high schools can best protect themselves by not attempting to censor at all, thus distancing themselves as much as possible from the functions of the newspaper. But for private schools and public high schools outside the Seventh Circuit, no foolproof answer exists. However, several alternatives can be considered. Most important, both sides must seek the same goal: a financially healthy and well-respected publication. A publication that meets the high standards of most professional newspapers will be a benefit to both the school and its students. It can enhance the reputation of a school, educate a student body and disseminate information of special concern to the school. If administrators view the paper as an aid to their interests, everyone can work to insure that the proper mixture of caution and freedom is exercised.

The following proposals should be carefully considered and discussed among administrators and students at all schools to decide what is appropriate for their particular situation:

1) A clear, written set of guidelines, read by all reporters, advisers, and involved administrators could be helpful in many cases. The guidelines should delineate what types of words or descriptions should send off "warning bells" in the reporter's head. A complete copy of model student publications guidelines are printed in *Law of the Student Press*,[26] and this issue of the *Report* contains an article concerning the elements of libel which may help clarify proper guidelines students should follow. Guidelines could also be used in high schools and private colleges as written proof that the school does not and will not exercise content control over student publications. This could prove to be an aid in protecting the school from liability.

2) A college newspaper staff should consider making its publication a corporation separate from the university.[27] Currently, about one-fifth of all college publications are independently incorporated.[28] This does not mean the paper must give up its financial support from the school, but some student press experts believe this may be a way of distancing the paper from the school if the paper is already functioning autonomously. If this route is followed, the formalities of a corporate separation should be carefully followed during both the formation and operation of the incorporated publication. This includes all newspaper funds being administered separately from the school's funds. The publication should also print in each edition a disclaimer emphasizing its separate operation and that the views expressed in the paper are not necessarily those of the university.

3) The school could carry an insurance policy covering its own liability, including defense costs. The school could carry insurance for the paper as well, or a college publication that is independent of the university could carry its own insurance. There are drawbacks to insurance, however, and they should be carefully considered. (See box).

As should be evident, an inconsistency exists in schools possibly appearing vulnerable to liability and at the same time not being able to exercise direct control over the paper through prior review and censorship. Court decisions seem to suggest a test: when a school has some control over the content of the paper, it will be held liable. Schools, not sure of the control they can be said to have, often opt to "play it safe" and settle out of court rather than see the case reach final judgment. Only one of the cases reported to the SPLC shows that an individual

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Will the libel monster get you?

student writer has paid a libel judgment.[28] Instead the schools, newspapers and their insurance companies have made all payments, with insurance companies paying the bulk of the claims. Of the 14 cases that were settled rather than dismissed, the school or its insurance company was involved in six. It is estimated that they will be involved in at least three of the remaining nine cases still pending, if either a settlement or liability arises.

The question of legal responsibility is directly related to who has had control over printed material. Thus, the status of the school is an important factor in determining who is potentially liable. The cases illustrate that a state college or university or a public high school in the Seventh Circuit cannot be held liable if it does not attempt to control the content of the student newspaper. It cannot exercise control in violation of the First Amendment by censoring the contents before publication; it can only advise. However, a public high school or a private high school or college that does not exercise control because it has developed a "hands-off" policy may still be liable because it has the legal authority to control. It must be stressed that the law in this area remains unclear.

Whoever may be financially responsible for a libel judgment, all would agree that libel is something to be avoided. The one guideline to follow in all settings is that of awareness. Student journalists who are aware that statements are potentially libelous and take steps to be professional in the reporting of such matters can prevent a lawsuit that nobody wants. ■

NOTES

[1] Franklin, *Libel Suits against the Media: A Litigation Study*, Am. B. Found. Research J., Summer 1981, at 795. The study shows that the number of libel cases against professional newspapers averages about 100 a year — 300 cases were reported in the three-year period from 1977-1980. That statistic does not tell the whole story, however, for many more cases are filed and settled out of court than are actually litigated. For example, the *Columbia Journalism Review*, July/August 1981, at 17, stated that in the years just before 1979, the libel claims filed against clients of Employer's Reinsurance, a leading insurer in the libel field, had tripled to reach the 1979 figure of 692. In 1980, claims filed against the insurer totaled 651.

[2] Church, *Who Pays When Student Papers Sued?*, SPLC Rep., Spring 1980, at 39.

[3] *Id.*

[4] "Carol Burnett's Jury Verdict Cut in Half", N.Y. Times, May 13, 1981, at 7 (jury verdict reduced to $800,000).

[5] Miss Wyoming's verdict was reduced to $14,000,000. N.Y. Times, March 28, 1981, at 6.

[6] The *Kaimin*, University of Montana, settled for $14,000 in 1976. The Michigan State University *State News* settled for $50,000 in 1977.

[7] Franklin, *supra*, at 795.

[8] Half of the 25 percent of the cases in which plaintiffs were successful at the trial level are reversed on appeal. *Id.* at 801.

[9] *Id.* at 797.

[10] SPLC Rep., Fall 1979, at 25.

[11] Note, *Tort Liability of a University for Libelous Material in Student Publications*, 71 Mich. L. Rev. 1061, 1088 (1970). The article commented that some 35 percent of the newspapers surveyed were covered by their own or their school's insurance policy.

[12] W. Prosser, The Law of Torts 459 (4th ed. 1971).

[13] SPLC Rep., Fall 1979, at 25.

[14] SPLC Rep., Fall 1977, at 22.

[15] SPLC Rep., Fall 1981, at 28.

[16] Note, *supra*; Church, *supra*.

[17] Prosser, *supra*, at 458.

[18] Note, *supra*, at 1071.

[19] 477 F. 2d 456 (4th Cir. 1973).

[20] 441 N.Y.S. 2d 600 (1981).

[21] 436 So. 2d 1300 (La. App. 1983).

[22] *Fujiahima v. Board of Education*, 460 F. 2d 1355 (7th Cir. 1972). *Antonelli v. Hammond*, 308 F. Supp. 1329, 1335 n. 6 (D. Mass. 1970) suggests the same.

[23] *Baughman v. Freienmuth*, 478 F. 2d 1345 (4th Cir. 1973); *Shanley v. Northeast Indep. School Dist.*, 462 F. 2d 960 (5th Cir. 1972); *Eisner v. Stamford Bd. of Educ.*, 440 F. 2d 803 (2d Cir. 1971).

[24] 485 S.W. 2d 190 (Tenn. 1973).

[25] Student Press Law Center, *Law of the Student Press* 36 (1984).

[26] *Id.*

[27] *See Incorporation: Should college papers risk taking this road?*, SPLC Rep., Fall 1984, at 11.

[28] Note, *supra*, at 1088.

[29] *Milliner*, 436 So. 2d at 1300.

Know thine enemy

Defining the elements of libel

Libel is one of the most misunderstood areas of mass media law, its elements being frequently misinterpreted by both journalists and the public. It is important that student journalists have a basic understanding of libel law and its complexities, for they might one day find themselves at the center of a libel lawsuit.

Libel has been defined as a false statement which injures the reputation of a person. It has four basic elements: publication identification, injury and fault.

The first element in a libelous statement is publication: "It is essential to tort liability for either libel or slander that the defamation be communicated to someone other than the person defamed." [1] For example, a defamatory writing by a student journalist concerning a college dean

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communicated only to that person would not constitute libel; but when the student writer communicates it to any other person, it may then be determined libelous. [2] The rationale behind the need for publication is that there must be a lowering of a person's reputation in the community; if the statements never reach the public, then they never have the chance to diminish his reputation. [3]

A libelous statement must also identify the person who claims he has been defamed. Identification does not require that the individual be mentioned by name: "It is enough that there is such reference to him that those who read or hear the libel reasonably understand the plaintiff to be the person intended." [4] Thus, for example, if a student publication asserts that a "big, bad, bald man" solicits prostitution and a school principal can prove that the readers of this publication understood that the description refers to him (perhaps he was the only "big, bad, bald man" in the school), then he has proven identification—that the article was of and concerning him. Furthermore, not everyone who reads the article need understand that it is of and concerning the person who claims he has been libeled; identification is proven when merely some readers believe the statement is about him. [5]

What kind of injury is required to show a libel? One author defined it as "that which tends to injure reputation in the popular sense: to diminish the esteem, respect, good will, or confidence in which the plaintiff is held, or to excite adverse, derogatory, or unpleasant feelings or opinions against him." [6] Journalists must remember that the reputation of the person who claims he was defamed does not have to be lowered in the eyes of all members of a community. In order to prove injury, the plaintiff need only show that his reputation has been tarnished in the esteem of any "substantial and respectable group," even though that group is only a small minority of the public. For example, one court held that an article which attributed the authorship of an inferior book on Palestinian culture to a noted writer was libelous, even though only a few experts in the field realized the implications of the article. [7] Certainly, school personnel alone could constitute this group requirement.

The final, and possibly most controversial, element of libel law is fault and the different standards used to find whether a journalist is responsible for the defamation he publishes. The U.S. Supreme Court has ruled that a "public official is barred from recovering damages for defamatory comments about his official conduct unless he proves with convincing clarity that the comments were made with actual malice." [8] Actual malice is found when a journalist knew that the statements he printed were false or when he recklessly disregarded the truthfulness of the statements. A public official is defined by the Supreme Court as one who has or appears to have a substantial

influence over governmental affairs.[9] At least one court has held that teachers are not public officials because the relationship between teaching and the conduct of government is too remote to qualify as a substantial influence over governmental activities.[10] However, courts may consider school principals and college presidents as public officials because of their broad control over the operation of public schools.

Although they do not qualify as public officials, school personnel, students and members of the public may have to prove that the journalist they sue for libel acted with actual malice. According to the U.S. Supreme Court, public figures also must prove actual malice to win their libel suits.[11] A federal appeals court held that a three-point test must be met to determine whether a person is a public figure. First, there must exist a public controversy involving the person suing for libel, a controversy which "has foreseeable and substantial ramifications for persons beyond its immediate participants." Second, the person "must have been purposely trying to influence the outcome or realistically have been expected, because of his position in the controversy, to have an impact on its resolution." Finally, the libel at issue must be germane to the person's involvement in the controversy; libelous comments wholly unrelated to the controversy are unprotected by the First Amendment.[12]

The following hypothetical example may help to show how people in the high school or college environment become public figures. If a student newspaper prints an article about homosexual rights and asserts that a teacher who is active in the homosexual rights movement is gay when in fact he is not, the teacher bringing a libel suit against the paper for that article is a public figure when: 1) the movement is a matter of public debate, 2) the teacher has taken an active role in the controversy, and 3) the alleged libel pertains to the teacher's role in the controversy. At least one court has held that a school football coach may become a public figure,[13] while another has determined that even students can become public figures.[14] In the latter case, the student was a student senator who spoke out against the campus newspaper and took part in various campus issues. As long as the three-point test is met, anyone can become a public figure. However, it is crucial to remember that only a court can ultimately determine who is a public figure; student journalists should resist formulating their reporting methods according to their view of the public or private figure status of an individual.

If a person is neither a public official nor a public figure, he may recover for a libel if he can show that the journalist was negligent in preparing his defamatory story.[15] The courts have reasoned that private figures need more protection against libel, as they have not subjected themselves to public scrutiny and opened their actions to public criticism. Courts have not been uniform in defining negligence. Two schools of thought exist: the "reasonable man" standard and the "reasonable journalist" standard. The Arkansas Supreme Court has applied the reasonable man standard, saying negligence equals the failure to exercise ordinary care prior to publication to determine the defamatory potential of the statements in question.[16]

Other courts believe the special practices of the press—the reasonable journalist standard—must be relevant to a definition of negligence. The Utah Supreme Court has said that a media defendant will be held responsible for the skill and experience normally possessed by journalists.[17] Simply put, the reasonable journalist standard is defined as the ordinary care of journalists: negligence will be found when the journalist fails to use ordinary journalistic practices in seeking to determine the veracity of his statements. However divergent these two standards appear, both require the journalist to take care to check the accuracy of his facts. If he does not, a finding of negligence will be likely.

When sued for libel, a student journalist has a number of defenses. One major defense is truth: if a damaging statement is true, no libel suit can be maintained. Also, opinions are not subject to libel law. This defense is referred to as the fair comment rule: "Mere words of abuse, indicating that the defendant dislikes the plaintiff and has a low opinion of him, but without suggesting any specific charge against him, are not to be treated as defamatory."[18] The U.S. Supreme Court has held: "[U]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is not constitutional value in false statements of fact."[19]

There are two aspects of libel law popularly believed to be defenses but which in fact are not. Many believe that no action can be taken for libel if the author only intended the material to be a joke. Most courts have agreed that in

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an action for defamation it is immaterial what meaning the speaker intended to convey, and that if a person in jest conveys a serious imputation, he jests at his own peril.[20] When publishing a humorous column or a parody edition of a publication, students should consider whether any person could reasonably construe the article to be serious. If any doubt exists, it is advisable not to print the material unless consent is obtained from the individuals whom the story concerns. Also, it is crucial to remember that no defense exists if a person merely reprints a libel expressed by another person, even if directly quoted or in a letter to the editor. Before printing statements of fact gathered from others, student journalists should verify the accuracy of these statements.

In the last 10 years, 28 libel suits against student publications have been reported to the Student Press Law Center. The threat of a libel suit should prompt student journalists to keep the elements of libel in mind. ■

NOTES

[1] W. Prosser, The Law of Torts 776 (4th ed. 1971).
[2] *Id.* at 767.
[3] *Id.*
[4] *Dyjkstra v. Westerink*, 401 A.2d 1118, 168 N.J. Super. 128 (1979).
[5] Prosser, *supra*, at 749.
[6] Prosser, *supra*, at 743.
[7] *Bel-Oliel v. Press Publication Company*, 251 N.Y. 250, 167 N.E. 432 (1929).
[8] *New York Times Co. v. Sullivan*, 376 U.S. 254, 311 (1964).
[9] *Rosenblatt v. Baer*, 383 U.S. 75 (1966).
[10] *McCuthcheon v. Moran*, 425 N.E.2d 1130, 99 Ill.App.3d 421, 54 Ill. Dec. 913 (1981).
[11] *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 339 (1973).
[12] *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980).
[13] *Winter v. Northern Tier Publishing*, 4 Med. L. Rptr. 1348 (N.Y. S. Ct. Westchester Co. 1978).
[14] *Klahr v. Winterable*, 418 P.2d, 4 Ariz. App. 158 (1966).
[15] *Gertz*, 418 U.S. at 339.
[16] *Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840 (Ark. 1979).
[17] *See Miller v. KSL, Inc.* 626 P.2d 968 (Utah 1981).
[18] Prosser, *supra*, at 742.
[19] *Gertz*, 418 U.S. at 339.
[20] *Brooks v. Stone*, 10 Med. L. Rptr. 1517, 1518 (Ga. Ct. App. 1984).

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